No. 11757

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TIDE WATER ASSOCIATED OIL COMPANY, a corporation,

Appellant,

vs.

DAVID LAWTON RICHARDSON and BETHLEHEM STEEL COMPANY, a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Statement.

This is an appeal in admiralty from a final decree entered by the United States District Court, for the Southern District of California, Central Division, in an action for damages by reason of personal injuries sustained by the appellee Richardson when he fell into an open port bunker hatch on a vessel then resting in navigable waters of the outer harbor at Terminal Island or San Pedro, California.

Final Decree was entered on August 30, 1947. [Ap. 90.]

Assignments of Error were filed September 8, 1947. [Ap. 91-107.]

Petition for Appeal was filed and allowed September 8, 1947. [Ap. 108-110.]

Notice of Appeal was served on September 8, 1947 and filed September 10, 1947. [Ap. 111.]

Bond on Appeal was filed and approved on September 8, 1947. [Ap. 113-114.]

Notice of Filing Bond was served and filed September 10, 1947. [Ap. 117.]

Jurisdiction of civil causes of admiralty and maritime jurisdiction is vested in the courts of the United States by Article III, Section 2, of the Constitution of the United States, to wit: "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

An appeal from a final decree in admiralty is authorized by Section 128a of the Judicial Code (43 Stat. at L. 936, 28 USCA, Sec. 225, which provides that a Circuit Court of Appeals shall have appellate jurisdiction to review final decisions).

(A) Statement of the Case.

At the time appellee Richardson was injured he was a seaman first class in the United States Coast Guard and was attempting to cross the deck of a tanker owned by appellant but at the time in the repair docks or shipyard of Bethlehem Steel Company for annual inspection, general repairs and modifications for the reason that the Administrator, War Shipping Administration, intended to allocate the vessel to the United States Navy. The vessel was not susceptible of navigation or use in commerce on the date of the accident, to wit, August 6th, 1944, said vessel having been delivered to the Bethlehem Steel Company in the month of July, 1944. Repairs and modifications for the account of the United States of America were actually in progress prior to August 6, 1944. For several days prior to that date the shipyard was also engaged in making certain repairs designated as "owner's repairs." In the making of the repairs on said vessel the workmen of the Bethlehem Steel Company removed a rope barricade which had been placed by the vessel's crew around the port bunker and also raised the port bunker hatch from its position resting upon an iron bar which held the hatch at about a 45 degree angle to the plane of the deck and pushed the hatch all the way open causing the edge furthest from the hinges to lean against a bulkhead located approximately six inches aft of the after edge of the bunker hatch coaming. All of the ship's machinery had been rendered inoperative within 24 hours of the time the vessel was delivered to the shipyard and it had no means of generating electricity or any power of any

kind. The shipyard furnished electric energy to the vessel by connecting electric power from the shore to a receptacle near the main switch boxes of the vessel so that the vessel's electric lights in the cabins and passageways and cargo lights could be turned on by means of the ordinary electric switches or push buttons. The vessel had no portable electric light equipment which could have been used to illuminate the surface of the main deck of the vessel at or near the port bunker hatch.

The employees of the shipyard, when leaving the work at or about 3:30 P. M. on Saturday, August 5, 1944, did not place or cause to be placed any lights in the vicinity of the wide-open port bunker hatch and did not barricade or rope off the area. On Sunday night, August 6, 1944, the appellee Richardson came aboard the vessel by means of a gangway at a point along the starboard rail forward of the forward bulkhead of the midship house. There was a portable electric light at the head of the gangway and this light illuminated the starboard side of the main deck from the gangway to the forward entrance of an inside fore and aft starboard passageway along the level of the main deck. The appellee Richardson entered said starboard passage way, proceeded to the after end thereof, turned to the right and proceeded athwartship to the after end of a similar passageway on the port side, thence he turned to the right and proceeded to the forward end of said port passageway, pulled back a canvas flap, stepped over an 18 inch coaming or threshold with his left foot and allowed the canvas flap to close and then attempted to proceed in total darkness, without hesitating to permit

his vision to become accustomed to the total darkness, turned to the right and took one step with his right foot and placed it in the opening of the port bunker hatch coaming. He sustained a fractured femur and after being treated for several months for a fractured femur, claimed that he also injured his back.

The trial judge found that Tide Water Associated Oil Company owed a duty to the appellee Richardson to either light the area where he was injured or to rope it off or to have closed the port bunker hatch and that there was a breach of such duty and injury proximately resulting therefrom. The trial judge held that there was no contributory negligence involved and that Bethlehem Steel Company was not guilty of any actionable negligence.

(B) The Pleadings.

The libel alleges that Tide Water Associated Oil Company was the owner and operator of the SS Frank G. Drum and at the time of the accident said vessel was on navigable waters of the United States of America, at the repair docks of the respondent Bethlehem Steel Company, and was so docked for the purpose of undergoing repairs by Bethlehem Steel Company; that libelant was a seaman first class, United States Coast Guard; that libelant, on the 6th day of August, 1944, was in charge of a detail of guards in connection with patrolling docks of the Bethlehem Steel Company and ships located on navigable waters of the United States of America at said dock; that his duty was to check upon guards on duty and make fur-

ther checks on docks and ships to verify reports of other coast guardsmen on duty and make complete check-ups on docks and ships at said Bethlehem Steel Company; that respondents (Tide Water Associated Oil Company and Bethlehem Steel Company) knew, or in the exercise of ordinary care should have known all of the duties of libelant; that at about 9:10 P. M. on August 6, 1944, libelant entered said ship in his official capacity and in line with his duties for the purpose of inspecting said ship for the benefit of the said respondents.

Libelant alleges that respondents negligently conducted, controlled and maintained the vessel and the repair docks and negligently and knowingly caused, maintained and permitted the port bunker hatch to remain open and unguarded, in a dark condition and that the respondents "invited and permitted libelant onto said ship for the purpose of making the inspection" and that "while making said inspection and due to the negligence, etc. of the respondents he fell into the open hatch and was thereby damaged." [Ap. 4-12.]

All of the material allegations of the libel, with the exception of the allegation that respondent Tide Water Associated Oil Company was the owner of the vessel were denied by appellant. [Respondent Tide Water's Answer, Ap. 45-53.]

Specification of Assignments of Error.

The Assignments of Error upon which appellant relies are set forth in the Appendix to this brief at pages 24-39 and are summarized in the following statement of questions involved in the appeal of said appellant:

1. The appellant contends that the libel does not state facts sufficient to constitute a cause of action against the appellant.

2. The appellant contends that there is no evidence in the record sufficient to sustain findings in favor of appellee Richardson on the following specific propositions:

(a) That there was a duty owed by appellant to Richardson.

(b) That appellant breached such duty.

(c) That such breach of duty proximately caused damage to Richardson.

(d) That Richardson was not guilty of negligence proximately causing or contributing to his injury.

(e) That Richardson did not assume all risk of injury.

3. Bethlehem Steel Company was a bailee of the vessel and if there was any duty on the part of any private entity to protect the bodily safety of Richardson, such duty rested solely and exclusively on Bethlehem Steel Company.

4. The only possible negligence which could have existed was negligence on the part of employees of Bethlehem Steel Company for which appellant cannot be held responsible.

5. If the appellee Richardson is entitled to any decree awarding him damages for personal injuries the only private entity from which he should recover is Bethlehem Steel Company.

6. The trial court committed errors in its findings of fact and conclusions of law in the particulars set forth in the Assignment's of Error [Ap. 91-107] and said Assignments of Error are set forth in the Appendix to this brief.

Summary of Argument.

I. The libel does not state facts sufficient to constitute a cause of action. It fails to allege that Richardson was a petty, warrant or commissioned officer in the Coast Guard. Therefore he was not authorized by law to board or inspect the vessel. (Title 14, USCA, Sections 45, 46 and 47.) The libel, aside from the foregoing omission, fails to allege facts showing the existence of any relationship between the appellee Richardson and appellant pursuant to which appellee Richardson was on board the vessel for the purpose of transacting any business with appellant or for the purpose of engaging in any action which was necessarily incident to any business or commercial enterprise being transacted or conducted by appellant. The libel also fails to allege that the appellee Richardson was in or on a part of the vessel provided or intended for permitting a person to proceed from one point to another, such as a passageway. The libel makes an attempt to *create* a *duty* on the part of the appellant by mere allegations of acts or omissions and labelling such acts or omissions as negligent or careless acts or omissions. The use of the descriptive adjectives does not help a libelant to state a cause of action in the absence of allegations of *fact* showing the *existence* of a *legal duty,* to *the* person bringing the suit, by *the* person sued.

II. The evidence fails to establish actionable negligence on the part of appellant for the reason that appellant owed

no duty to the appellee Richardson. There was no duty on the part of the appellant to make the deck of the vessel safe for use by appellee Richardson. Appellee Richardson failed to notify anybody aboard the vessel that he intended to attempt to walk in the vicinity of the open port bunker hatch while that area was dark. In fact Richardson failed to notify anybody on board the vessel where he was going or what he intended to do. That part of the vessal, and in fact the entire vessel, was in the custody and control of the appellee Bethlehem Steel Company.

III. The Bethlehem Steel Company had executed a written contract with the United States of America prior to the time the vessel was delivered to the shipyard of Bethlehem Steel Company and pursuant to the terms of that written contract it was the duty of Bethlehem Steel Company to do all work aboard the vessel in a reasonably safe manner and to take all reasonable precautions for the bodily safety of any person who might *lawfully* come aboard the vessel.

IV. The appellee Richardson was guilty of negligence proximately causing his injury and he also assumed the risk of injury for the reason that he went to a part of the vessel where he had no duties whatever to perform and *claimed* he was looking for *non-existent* fire extinguishers and fire hoses. Appellee Richardson attempted to proceed along the surface of what he thought was a deck although he had actual knowledge of the fact that the vessel was in the shipyard for repairs. By proceeding in total darkness and without taking the slightest precaution for his own safety, he was guilty of negligence which was *the* proximate cause of his injury and he also assumed all risk of injury which might result from *unnecessarily* proceeding in total darkness.

ARGUMENT OF THE CASE.

I.

The Libel Does Not State Facts Sufficient to Constitute a Cause of Action Against the Appellant.

A. The First Requisite of a Cause of Action for Damages by Reason of Bodily Injuries Is the Existence of Some *Legal Relationship* Between the Person Injured and the Person Claimed to Be Responsible, or in the Absence of Such Legal Relationship There Must Be a Duty Owed, by the Person Claimed to Be Responsible, to the Injured Person as a Member of a Class Intended to Be Protected by an Applicable Statute, or the Person Must Have Been Injured Under Circumstances and in a Place Where the Person Claimed to Be Responsible Owes a General Duty to All Persons Lawfully Present, Such as a Public Highway.

The appellee Richardson was on private property at the time of his injury so we need not consider any point excepting the legal relationship, if any, shown by the allegations of the libel. Richardson's status could be only *one* of three, viz: (a) Business invitee; (b) Licensee; or (c) Trespasser. *All important in a correct statement of the actual relationship, if any, is the part of the vessel where the accident occurred.*

The primary condition precedent to the existence of the relationship of business-invitor and invitee is *business.*

> "A business visitor is a person who is invited or permitted to enter or remain upon land for a purpose connected with *business* which *concerns* the occupier. Many courts require that the business be pecuniary in its nature, or of economic benefit to the *possessor;* others require only that it be such that there is an implied representation that care has been exercised to make the land safe for the visitor.

"The *possessor* is required to exercise reasonable care to warn the *business* visitor, or to make the premises safe for him, as to dangerous conditions or activities of which the *possessor knows, or those* which with reasonable vigilance he could discover. The obligation exists only while the visitor is upon *a part of the land* which *concerns* the *business* of the *occupier*." (Italics added.)

Prosser on Torts, Hornbrook Series, page 635.

The appellant is not conceding, even for the sake of argument, that the appellee Richardson was a business invitee or business visitor, or any type of invitee, but refers to the rules which fix the right and liabilities of business invitors and business invitees for the purpose of demonstrating that appellee Richardson does not state facts sufficient to constitute a cause of action even if he were an actual business visitor.

As is said by Prosser on Torts, Hornbrook Series, West Publishing Co., commencing at the middle of page 640:

"This special obligation toward business visitors exists only while the visitor is upon a part of the land which concerns the business of the occupier, and so is included in his 'invitation.' It extends of course to the entrance to the premises, and to a safe exit after the business is concluded. It extends also to all parts of the premises which are thrown open to the visitor, and to those to which the particular business purpose may reasonably be expected to take him. Beyond this, it extends to any unusual places, such as behind a counter, the top of a tank or a workshop, which he may enter with the consent of the possessor for the business purpose. But it does not include unusual parts of the premises, not open to similar visitors, which he may enter without consent, even

for such a purpose; nor does it include places to which he goes for personal reasons of his own, not connected with the business upon which he came. When he goes beyond the limits of his business invitation, he becomes a trespasser, or at most a licensee. . . ."

Again on page 628, Prosser states as follows:

"The courts have encountered considerable difficulty in dealing with public officers, firemen and the like, who come upon the land in the exercise of a legal privilege and the performance of a public duty. Such individuals do not fit very well into any of the more or less arbitrary categories which the law has established. They are not trespassers, since they are privileged to enter. The privilege is independent of any permission or license of the possessor, and there is no right to exclude them. Nor are they properly considered business visitors, since they do not come for any purpose for which the premises are thrown open, and it would be absurd to say that a customs or revenue agent or a policeman on his way to arrest the landholder confers any economic benefit upon him. They are obviously in a class by themselves. Most courts, recognizing that entrance in performance of a public duty entitles the plaintiff to protection, have held that customs, tax and sanitary inspectors, postmen, garbage collectors, and city water meter readers are to be classed with business visitors, toward whom there is an affirmative duty to make the premises safe. On the other hand firemen and policemen are all but universally held to be mere licensees, entering under a license given by law, toward whom there is no such duty. The distinction has been explained on the basis that firemen and policemen are likely to enter at unforeseeable times

and places, and the possessor cannot be expected to have his premises constantly in readiness for them. Granted that this may be true, there is obvious merit in the position of the New York court, that he must at least exercise care to see that the usual means of access are safe for a visiting fireman, although he need not take precautions as to a bulldog in the cellar." (Prosser on Torts, pages 628-630.)

Appellee Richardson, as a matter of law, was not an invitee.

Title 14 USCA, Section 45, provides that:

"Commissioned, warrant and petty officers of the Coast Guard are empowered to make inquiries, examinations, inspections, searches, seizures and arrests upon the navigable waters of the United States for the prevention, detection and suppression of violation of laws of the United States. For such purpose, such officers are authorized at any time to go on board of any vessel, subject to the jurisdiction, or to the operation of any law, of the United States, to address inquiries to those on board, to examine the ship's documents and papers, and to examine, inspect and search the vessel and use all necessary force to compel compliance. . . ."

The only object for which the appellee Richardson could have boarded the vessel in the course of his duty as a member of the armed forces of the United States would be to prevent, detect and suppress violations of statutes of the United States. In other words, disregarding for the moment the fact that he was not a commissioned, warrant or petty officer, he comes within a group of persons who are in the same category as firemen and policemen.

"It has been held that a policeman or constable entering private premises in the performance of his

duty is a mere licensee to whom the owner owes no common law duty to keep the premises safe, although the owner may be liable for an injury resulting from his neglect of a statutory duty with respect to the condition of the premises."

45 Corpus Juris, 794, Sec. 199.

"A member of a public fire department who enters a building in the exercise of his duties is a mere licensee under permission to enter given by law, and the owner or occupant of the building does not owe to such person any duty to keep the premises in a safe condition."

45 Corpus Juris, 794, Sec. 200.

In the libel there is no allegation of any fact showing any neglect of any statutory duty with respect to the condition of the SS. Frank G. Drum.

"In the minority of jurisdictions the rule is well settled that, in the absence of a statute or municipal ordinance, a member of a public fire department, who, in an emergency, enters on premises in the discharge of his duty is a mere licensee, *under a commission to enter given by law,* to whom the owner or occupant owes no greater duty than to refrain from the infliction of wilful or intentional injury." (Italics added.)

13 A. L. R. 638.

Please see also:

141 A. L. R. 584, supplementing the annotation in 13 A. L. R. 637-638.

There is no allegation in the libel of any overt act on the part of the appellant.

Assuming, for the sole purpose of argument, (in spite of the authorities hereinabove cited) that the appellee

Richardson could have been an invitee of the appellant aboard said vessel, there is no allegation of any fact showing that he was invited to be in the particular part of the vessel where he sustained his injury. It is an elementary principle that a person may be an invitee in one part of premises and a trespasser or licensee in other parts. For instance, a passenger on an ocean-going liner is an invitee while using those parts of the vessel set aside for the accommodation of amusement of passengers. On the other hand, if a passenger, out of curiosity, roams around the engine room even with the consent of the licensed officers in charge thereof, he would be a licensee. If he did the same act without the consent of the licensed officers, he would be a trespasser. Therefore, if it is legally possible for appellee Richardson to have been an invitee of the appellant, he should allege *facts showing* that he was at *the* place of the accident as an invitee of the appellant.

Appellee Richardson fails to allege in his libel that he was using any passageway which was designed for the purpose of affording access from or to any part of the vessel.

Please see excerpt from 45 Cal Jur. 798-802, Sec. 203, Appendix A, page 1.

Disregarding, for the moment, the many adjectives used by appellee Richardson in qualifying the alleged acts which resulted in his injury, it is clear that the physical cause of the injury was an open hatch in some part of the vessel. The reason, as stated by Richardson, for his fall into the open hatch was that said open hatch was not illuminated so that the appellee Richardson could see said open hatch.

Appellee Richardson alleges that the vessel was docked at the time and place for the purpose of undergoing repairs by appellee Bethlehem Steel Company. [Ap. 6.] He therefore had knowledge of the fact that he could not reasonably expect the vessel to be in the same condition throughout as might be the case if the same had not been withdrawn from navigation.

If Richardson was at most a licensee, he must allege facts showing that appellant committed some overt act after Richardson boarded the vessel as such licensee and that such overt act proximately caused his injury. There was no affirmative duty on the part of appellant to perform any act such as lighting the area around the hatch. Appellant's only duty would be to refrain from committing an overt act of negligence after Richardson came aboard. A licensor is entitled, under the law, to remain passive and has no affirmative duty. There is no allegation of any fact in the libel showing that Richardson notified any responsible agent of appellant that he intended to go to the particular part of the vessel where the open hatch would be encountered. Appellee Richardson does not even allege that any agent or employee of appellant was aboard the SS. Frank G. Drum at the time Richardson went aboard. All he says is that John One was charged with the duty of permitting members of the Coast Guard to board the SS. Frank G. Drum for the purpose of making inspections of said ship and that John Five "was in charge of that certain ship which was then and there known and referred to as SS. 'Frank G. Drum' hereinafter mentioned."

Appellant has already shown (14 U.S.C.A., Sec. 45) that there wasn't anything appellant could have done about keeping appellee Richardson off of the vessel. The mere fact that John Five was in charge of the vessel does not

mean that John Five was on the vessel or an agent of appellant.

It is clear from the allegations in the libel that appellee Richardson boarded a vessel which was known to be in the repair docks of Bethlehem Steel Company for the sole and exclusive purpose of repairs, and that therefore any person possessing the normal use of ordinary perceptive faculties would realize that unusual conditions existed and might be found at any part of the vessel. Under these circumstances the law as set forth in the case of *Ambrose v. Allen,* 113 Cal. App. 107, 289 Pac. 169, is directly applicable.

Please see excerpt from opinion, Appendix B, page 3.

The decision of the Court in *Kolburn v. P. J. Walker Co.,* 38 Cal. App. (2d) 545, 101 P. (2d) 747, is also in point. Please excerpt from opinion, Appendix C, page 7.

Appellant, being somewhat confused by what has occurred in the lower court, requests this Court, in the exercise of its duty to protect the rights of appellant as guaranteed by the 5th Amendment, Constitution of the United States, to *decide,* in language which *fairly* answers the question, how the Tide Water Associated Oil Company *could* have been a business invitor or *any* kind of *invitor* of appellee Richardson, unless it *could* have lawfully *refused* to allow him to come *aboard the vessel.* This question cannot be answered by a casual reference to the cases, state and federal, involving customs, tax and sanitary inspectors, postmen, garbage collectors, or city water, gas or electric meter readers, etc., because in each such case the individual official *could* have been kept off the premises if the possessor thereof elected *not* to

conduct thereon any business enterprise which would *require* the presence of such persons, from time to time, in the performance of *statutory* duties, in specific parts of the premises. In the case at bar there is *no* statute to which the appellee Richardson can point which gave to him any right to board the vessel on account of *any* activity being conducted by *Tide Water Associated Oil* Company while the vessel was *in the shipyard* of Bethlehem Steel Company. A reference to the basic logic underlying the conclusions of Courts as to the existence of a legal duty on the part of an *operator* of a *merchant* vessel to exercise toward a United States Customs Inspector the same degree of care it would exercise for the protection of any business invitee will make clear the obvious non-applicability of the rule of duty to the appellee Richardson in the case at bar. The operator of a *merchant* vessel, actively engaged in interstate or foreign commerce, voluntarily accepts cargo and passengers as a common carrier by water. It *cannot*—and knows it cannot—perform its contractual obligations to consignor, consignee or passenger until the customs inspector performs his official duties. Until official clearance has been accomplished neither cargo nor passenger may go ashore and the *business* of the operator would be at a standstill. The operator impliedly represents to the consignors, consignees and passengers that it will make all arrangements required by law as conditions precedent to the unloading of cargo and the disembarking of the passengers. Therefore, aside from the *statutory* right of the inspector to board the vessel, there is at least an implied representation of the operator to its customers and passengers that all officials, without whose permission no person or thing can leave the vessel, will be requested and invited to come aboard. On the other hand, if the vessel *has been cleared*

and is then *withdrawn* from *commerce and navigation,* no customs inspector would have the slightest right to board the vessel in his *official* capacity.

There is no allegation of fact in the libel stating that the SS Frank G. Drum was being operated or used in *any* commerce on August 6, 1944, or that the Tide Water Associated Oil Company was at said time using the vessel in *any* business enterprise, or that there was *any* contractual or statutory relationship between appellee Richardson and appellant.

As a matter of fact, the libel alleges, in legal effect, that the SS. Frank G. Drum had been and was at said time *withdrawn* from *all* commerce and navigation. Article Eighth [Ap. 6] alleges that the vessel "was . . . at the repair docks of the respondent . . . *Bethlehem Steel Company* . . . and that said ship was so docked at said place and time for *the* purpose of *undergoing repairs* by the said respondent . . . *Bethlehem Steel Company.*"

Of considerable importance also—ignored by the lower court—is the proclamation of the President (Executive Order No. 9054, 7 Fed. Reg. 837, as amended by Executive Order No. 9244, 7 Fed. Reg. 7327) pursuant to which the President established within the office for Emergency Management of the Executive Office of the President, a War Shipping Administration, under the direction of an Administrator appointed by and responsible to the President. Said Executive Order—having the force of law—provides that the *Administrator*—not the owner of any vessel—*"shall"* perform the following functions and duties:

> "The Administrator shall perform the following functions and duties: a. Control, the operation,

> purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States, except (1) combatant vessels of the Army, Navy, and Coast Guard; fleet auxiliaries of the Navy; and transports owned by the Army and Navy; and (2) vessels engaged in coastwise, intercoastal, and inland transportation under the control of the Director of the Office of Defense Transportation." (Title 50 U.S.C.A. App. sec. 1295.)

There is, and obviously could not be, no allegation in the libel stating that Tide Water Associated Oil Company, as owner of the vessel, had the *slightest* right to control the operation or *use* of the SS. Frank G. Drum on August 6, 1944. There is no allegation of fact stating that the vessel was at the repair docks of Bethlehem Steel Company for the purpose of undergoing repairs by said Bethlehem Steel Company pursuant to any *volition* of Tide Water Associated Oil Company. The allegation of the legal *conclusion*, in Article Eighth that on August 6, 1944, the Tide Water Associated Oil Company was the *operator* of the vessel is entirely nugatory in the face of the existing law providing that the *operation and use* of *all* ocean vessels under flag or control of the United States—whether or not privately *owned*—was subject to *exclusive* control of the *Administrator,* War Shipping Administration. The said legal conclusion of the pleader is also *nullified* by the allegation of *fact,* in the same Article, that the vessel was in the *physical* custody of Bethlehem Steel Company at *its* repair docks, at said time, "for the purpose of undergoing repairs by the *Bethlehem Steel Company.* The vessel could not have been *"operated"* and Tide Water Associated Oil Company could not have been an "operator" of the vessel for the simple additional reason that no person is an "operator"

of a vessel which has been withdrawn from all commerce or navigation and *cannot* be used in commerce or navigation until it is inspected and passed as to seaworthiness by the United States Steamboat Inspectors.

The lower court also ignored the contention of Tide Water Associated Oil Company that the mere fact that legal title to the vessel was vested in said appellant, coupled with the fact that the relatively few members of the crew who were aboard the vessel on Sunday, August 6, 1944, were *technically* employees of Tide Water Associated Oil Company, did not give to said company the *right* to control said "employees" because the Administrator was in *sole and exclusive* control of the *use* then being made of the vessel while it was in the physical custody of Bethlehem Steel Company.

The act of Richardson in coming aboard the vessel as a seaman in the armed forces of the United States was a use by him of the vessel and was within the exclusive control of the Administrator, War Shipping Administration. The crew members were not the agents of Tide Water Associated Oil Company in their activities, if any, in the use then being made of the vessel by Richardson because no principal is legally responsible for an actual *tort* of an "agent" unless at the time of the commission of the tort the "agent" was acting in the course and scope of his agency. None of the men aboard the vessel on Sunday, August 6, 1944, was there as a *member of the crew* for the reason that the vessel. as clearly alleged in the libel, had been and was withdrawn from commerce and navigation and could not have been in *any* commerce or navigation at said time. The allegations of the libel, plus the provisions of the Executive Order of the President, show as a *matter of law,* that even if the members

of the crew were the *general* employees of Tide Water Associated Oil Company, they were not at all subject to *any* authoritative control by Tide Water Associated Oil Company, and that they were under the sole and exclusive control of the Administrator, War Shipping Administration.

If the vessel was being operated or used by any entity whatever, that entity was the War Shipping Administration. Therefore the use of the vessel for the *sole* purpose of having it *repaired,* being within the *exclusive control* of the Administrator, War Shipping Administration, the work, if any, performed by the men remaining aboard the vessel while it was in the repair docks (shipyard) of Bethlehem Steel Company, was that of the War Shipping Administration and not that of Tide Water Associated Oil Company.

There is no allegation of *fact* in the libel stating directly, as is required by the provisions of the General Admiralty Rules of pleading, that *any* servant of Tide Water Associated Oil Company, acting in the course of his employment, caused or permitted the hatch to the bunker tank of said vessel to be or remain open or unguarded or in a dark condition. The allegation in Article Twelfth of the libel [Ap. pp. 8-9] is that the *respondents* (two *corporations*)* "knowingly, negligently, carelessly, recklessly and unlawfully operated, conducted, controlled and maintained said SS. Frank G. Drum, etc."

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*See amendment to libel, Ap. 73, which eliminated the persons referred to by fictitious names as respondents and changed them to claimed agents, servants or employees of respondents Bethlehem Steel Company "and/or" Tide Water Associated Oil Company.

Thus the libel, as amended, does not allege that *any* employee of Tide Water Associated Oil Company had anything whatever to do with *any* of the claimed acts or omissions stated in Article Twelfth of the libel. While it is obvious that a corporation may act only through its officers, managers, agents or employees, it cannot itself be a tort feasor. Therefore, a libel for damages, by reason of personal injuries, *must* allege *facts* which, if true, bring into effect the maxim *respondeat superior. There are no such allegations in the libel.* (Please see *Fimple v. Southern Pac. Co.,* 38 Cal. App. 727, 177 Pac. 871, as to requirements of pleading a claimed *respondeat superior* responsibility.)

If we assume, without conceding, that the allegation to the effect that a *corporation* has negligently caused, maintained or permitted a hatch on a vessel to be and remain open, unguarded and unlighted, is an allegation that the acts were committed by the corporation acting through an officer, servant or employee of such corporation while in the course of his agency or employment, such assumption will not establish any statement of a cause of action for the reason that, as a matter of law and no matter what inherently improbable or lawfully impossible relationship is alleged directly or by implication, *if* the persons *actually aboard the vessel* were the *general* servants of Tide Water Associated Oil Company, they were, while *any* use was being made of the vessel, the servants of the War Shipping Administration. This is so, *as a matter of law* and *regardless of any words* used by the pleader in a futile attempt to *circumvent or ignore* the provisions of positive law to the contrary, for the reason that the Administrator, War Shipping Administration, having the *exclusive* right to control the *"operation and use"* of the

vessel could only exercise such right of absolute and exclusive control if he possessed the exclusive authoritative right to control and direct the persons engaged in any work incident to such operation and use in and about the *details* connected with *how* such work was to be done.

Therefore, Tide Water Associated Oil Company would not be legally liable for any tort actually committed by any *general* employee aboard the vessel because the *work* such persons *may* have been doing while the vessel (and necessarily its personnel) was being used by the War Shipping Administrator for *the* purpose of having the same repaired was the work of the Administrator. Therefore, any negligent act or omission of such persons was not that of the general employer but that of his employer, *pro hac vice,* the War Shipping Administration, and its negligence, if any, would not be imputed to Tide Water Associated Oil Company.

The leading case on the subject of the "loaned servant" doctrine is *Denton v. Yazoo & M. V. R. R. Co.* (1932), 284 U. S. 305. Please see excerpt from opinion, Appendix D, page 9.

So every similar attempt to recover from private companies for the negligence of their employees in the course of doing the work of the United States has been rejected. See *Norfolk & W. Ry. Co. v. Hall* (4th Cir., 1932), 57 F. (2d) 1004, 1008; *McLamb v. DuPont* (4th Cir., 1935), 79 F. (2d) 966; and *cf. Hardy v. Shedden Co.* (6th Cir., 1897), 78 Fed. 610, 613; *Byrne v. Kansas City, Ft. S. & M. R. R. Co.* (6th Cir., 1894), 61 Fed. 605. See 61 A. L. R. 290.

Apart from some *statute* providing otherwise, no corporation can be compelled, within the meaning of due process of law and the right to the equal protection of the

laws (5th and 14th Amendments, Constitution of the United States) to respond in damages to a person injured by the negligence of another unless the activities of the latter, at the time and place of the tort, was subject to the control of the corporation under such circumstances as to bring the maxim *respondeat superior* into operation and effect.

The trial judge held that the provisions of Section 45, Title 14, U. S. C. A., were of no importance in this case. Appellant contends that said statute precludes the appellee Richardson from contending successfully that he had any lawful right to board the vessel. The statute, in so far as it is relevant to the case at bar, is set forth in the Appendix E at page 11.

Pursuant to the foregoing sections it is obvious that *officers* of the Coast Guard were agents of the Administrator, War Shipping Administration. He was an official "within the office for Emergency Management of the Executive Office of the President." (Executive Order Nos. 9054 and 9244, *supra.*) There is no allegation in the libel to the effect that the appellee Richardson was on board the vessel pursuant to any "rules or regulations promulgated by such department or independent establishment charged with the administration" of any of the provisions of the statutes conferring authoritative power upon the President during the existence of a state of war. The libel alleges that Richardson was at all times mentioned therein a "Seaman First Class" in the Coast Guard.

The only contingency pursuant to which enlisted men below the grade of "petty officer" could have boarded the vessel would occur if a commissioned, warrant or petty officer was faced with resistance by persons thereon. He

could then "use all necessary force to compel compliance." In doing so, such officer would be lawfully entitled to bring aboard or send aboard such number of armed seamen as might be required to subdue the persons who stand in the way of the performance of the duties of such officer as provided in said section 45, Title 14, U. S. C. A.

It is apparent from an inspection of the libel and a consideration of the foregoing laws of the United States that Richardson was not in the legal position of a customs inspector for the simple reason that there is no statute pursuant to which he had any lawful right to board the vessel under the circumstances alleged in the libel.

A most important element in considering the sufficiency of the allegations in the libel is the fact that Tide Water Associated Oil Company did not *voluntarily* enter into contractual relationship with the Administrator, War Shipping Administration with reference to the "time charter" of the vessel. The fact, as alleged in the libel, that appellant was the *owner* of the vessel at the time of the accident is of no importance in the absence of a specific allegation that the vessel and its use were at said time under the *control* of *appellant*. It has been conclusively shown that the operation and use of the vessel was under the *exclusive* control of the Administrator, War Shipping Administration.

If the vessel had been "time chartered" in a time of peace it is obvious that only the *charterer* could be an invitor of persons (excluding the members of the crew)

who might come aboard for any purpose connected with the *business* of the charterer. The *owner* of the vessel would not be using the vessel in commerce. When a *merchant* vessel of the United States is time chartered in peace time, a full crew is ordinarily furnished with the vessel, and there is at least an implied agreement on the part of the owner that such crew will keep the vessel in a reasonably safe condition for the conduct of the business enterprise of the time charterer. If there is a failure on the part of the crew to perform such duty there would be a breach of the contractual obligations owed to the *time-charterer*. An invitee of the time-charterer, not being in privity of contract with the owner, would have no cause of action for damages against the *owner* of the vessel for the reason that there would be no *relationship* between such invitee and the owner which would give rise to a legal duty to keep the vessel reasonably safe for the use of the vessel by such invitee of the time-charterer. The legal duty to the invitee would be imposed on the time-charterer. Of course, the time-charterer would be entitled to be protected against any loss by way of indemnity. That right to indemnity is not a tort liability of the owner. It is strictly contractual and the time-charterer would not have to allege or prove a *negligent* failure on the part of the crew to keep the vessel in a reasonably safe condition. Upon being sued, in any court, by the invitee, the time-charterer would be entitled to implead the owner pursuant to General Admiralty Rule 56 for the reason that the time-charterer would have the right to a decree or judgment placing the duty to protect the time-

charterer from loss directly upon the owner. The fact that the owner would have to pay the amount of the damages directly to the invitee does not mean that there is any breach of duty owed by the owner to the invitee of the time-charterer.

No doubt the appellee Richardson can cite many cases holding that when there is a time-charter, the owner of the vessel remains the employer of the crew and therefore remains in control, through the master of the vessel, of the navigation and physical handling of the vessel. Such cases are not pertinent or controlling precedent in the case at bar because the executive orders of the President hereinabove set forth placed the exclusive control of the operation and use of the vessel in the Administrator, War Shipping Administration. That exclusive control of the Administrator effectively brushes aside all case-made maritime law involving the legal responsibilities of the owner of a time-chartered vessel for the reason that in every such case the court predicated its judgment upon the reasonable and logical premise of the absolute control of the owner of the vessel in respect of the navigation and handling of the vessel. *That essential premise is absent here.* When the reason for a rule of law is non-existent, such rule is not applicable.

Appellant filed detailed exceptions to the sufficiency of the libel. (Ap. 13-16.) They are set forth in the Appendix to this brief at pages 40-54. It has always been the law that the lack of a statement of facts sufficient to show a cause of action may be asserted at any time, even on appeal. The appellant contends that the judgment of the trial court must be reversed for the reason that the libel fails to state facts sufficient to constitute a cause of action against Tide Water Associated Oil Company.

B. The Facts as Alleged in the Libel Show, as a Matter of Law That the Bethlehem Steel Company Was a Bailee of the Vessel From the Time It Was Delivered to the Shipyard of Bethlehem Steel Company.

It is a presumption of law, *conclusive* until rebutted, that official duties and functions have been performed. The Administrator, War Shipping Administration, was required by law to negotiate with all shipyards, contracts pursuant to which American Flag vessels would be accepted and repaired by various entities, including Bethlehem Steel Company, during the progress of the war. The standard contract forms issued by the War Shipping Administration, printed for the use of the Committee on the Merchant Marine and Fisheries, by the United States Government Printing Office, Washington, D.C., in 1945, contains a form of contract which was in full force and effect between the United States of America and Bethlehem Steel Company at the time the vessel SS FRANK G. DRUM was brought into the shipyard by the master of the vessel. The contract form is printed in said volume, commences at page 432.

The essential provisions of the contract are called to the attention of this Honorable Court and are set forth in the Appendix F at page 13.

In addition to the obvious result of the terms of the foregoing contract with reference to the sole and exclusive control of the vessel by Bethlehem Steel Company, appellant cites the following cases:

Long v. Silver Line, 41 F. (2d) 367 (Dist. Ct.);

Long v. Silver Line, 48 F. (2d) 15 (C. C. A.).

In *Crane Elevator Co. v. Lippert,* 63 Fed. 942, the owner of a building entered into a contract with an ele-

vator company to install some new elevators. The elevator company cluttered up a hallway which was used by tenants of the owner of the building and the hallway was not lighted and an employee of one of the tenants of the building fell by reason of the accumulation of debris and brought suit against the elevator company. The plaintiff prevailed and the elevator company took an appeal. The Court says, at page 947:

> "In the case before us there was a duty owing to the defendant in error, coupled with its breach, from which a right of action arose in his favor, if he was free from contributory negligence. Having placed obstructions in the hall, the duty rested upon the plaintiff in error to exercise reasonable care and prudence to protect from injury those having lawful occasion to use it, by means of lights or other suitable safeguards. This duty required the exercise of care and diligence on its part in proportion to the danger occasioned by the presence of these obstructions. It saw fit wholly to neglect the performance of this duty. It relied upon the lighting of the hall by the owner of the building as the sole means of protection against injury from these obstructions. Having intrusted to another the discharge of a duty resting upon itself, the plaintiff in error is responsible for a failure in its performance."

It is respectfully contended that the libel in the case at bar does not measure up to the minimum requirements of General Admiralty Rule 22 which provides that "the libel shall . . . propound and allege in distinct articles the various allegations of fact upon which the libelant relies

in support of his suit, so that the respondent or claimant may be enabled to answer distinctly and separately the several matters contained in each article . . ."

General Admiralty Rule 27 is also important in considering whether a particular pleading measures up to the requirement that it state facts sufficient to constitute a cause of action because it provides:

> "Either party may except to the sufficiency, fullness, distinctness, relevancy or competency of any of the pleadings . . . filed by the other party . . ."

The libel in the case at bar does not comply with the minimum requirements with reference to the statement of facts showing (1) a legal duty owed by Tide Water Associated Oil Company to appellee Richardson; (2) That there was a breach of such legal duty; and (3) Damage proximately resulting from such breach.

Mere ownership of the vessel is of no importance. The question of control of the vessel is the important consideration with reference to the first element of a claimed tort liability. This Honorable Court will notice in its examination of the text in Prosser on Torts, *supra,* that responsibility with reference to invitees, licensees and trespassers is placed, in accordance with the distinct legal principles applicable to each such classification, upon the *possessor* of the particular physical property involved. The same principles are recognized in all standard text books and legal encyclopedia discussing the subject. They are also recognized in the Restatement of the Law of Torts, Vol. II, Chapter 13, Sections 329 to 346.

II.

There Is No Evidence in the Record Sufficient to Sustain the Implied Findings of Fact That Appellant Was Guilty of Actionable Negligence; That Appellee Richardson Was Not Guilty of Negligence Proximately Causing or Contributing to His Injury; or That Appellee Richardson Did Not Assume All Risk of Injury.

In this subdivision of the brief, Assignments of Error from and including I to and including XLV [Ap. 91-102], are involved and are the bases of the foregoing summarized specification of error. These Assignments of Error are set forth *verbatim* in the Appendix.

When the SS Frank G. Drum was brought into port for the purpose of annual inspection and repairs, the port bunker hatch was resting on an iron bar, at about a 45-degree angle. [Ap. 419.] At the time the vessel was brought into the shipyard of Bethlehem Steel Company there was also a barricade consisting of rope around the partly opened hatch which, if left in said condition, would have prevented any person from getting near the opening of the hatch. [Ap. 420-421.] The port bunker hatch remained in said position, resting on the iron bar and effectively roped off, up to the time the appellee Bethlehem Steel Company started to do work, when said appellee raised it. [Ap. 420.] Within twenty-four hours of the time that the vessel was *delivered* to the shipyard of Bethlehem Steel Company all of the machinery of the vessel was rendered inoperative. [Ap. 421-422.] Employees of the shipyard were doing work which required the removal of the rope-barricade and the complete opening of the port bunker hatch so that it was leaning up against the bulkhead and said employees opened said bunker hatch. [Ap. 425-427.] No work was done by

any members of the crew at or about the port bunker hatch during the time the vessel was at the shipyard. [Ap. 456.] The bunker hatch remained in its absolutely safe condition until the shipyard workers commenced working on it. [Ap. 479.] After the accident had happened the port bunker hatch was roped off and a light was placed over it. That work was not done by any member of the security watch on board the vessel. The only person connected with the vessel who could have given an order to do such work was the third mate and he did not order the deck force to do it. He gave no order to anybody in the crew to do it. [Ap. 453-454.] Appellee Bethlehem's superintendent of hull repairs stated that the vessel came into the shipyard of said appellee in July, 1944, for repairs and that "the hull repairs consisted of damage to the shell and general repairs to bulkheads or decks or hatches, whatever was found necessary; that the company did quite a bit of work on the vessel; and that she entered the yard on July 26th and left the yard on August 18th, 1944." [Ap. 383-384.] It was the custom and practice of Bethlehem to replace all ropes and stanchions present at the start of work when a hatch is to be permitted to remain open during the night-time. If that particular bunker hatch had been roped off when the ship came into the shipyard, then the employees of Bethlehem were subject to general instructions to leave the ship as safe as they could when leaving the ship over night or over a weekend. [Ap. 394-396.]

The only *outside* lighting facilities belonging to the vessel which could have been turned on by means of any switch which was a part of the vessel's equipment were the mast lights. [Ap. 423.] While the vessel's equipment included portable lights, they could not have been

used for the reason that they were equipped with *marine* fittings; not the ordinary male type of plug. [Ap. 459.] In addition to the running of a power line to the ship's main electrical system, the shipyard also runs temporary lines on board, the full length of the ship but the ship's portable lights would not plug into the shipyard's plug-boxes. [Ap. 447-448.] Bethlehem's men came aboard after the accident and placed the port bunker hatch back on its iron rod support, roped the hatch off and placed a light there. [Ap. 430.]

William A. Harrington, assistant manager of Bethlehem Steel Company, was in charge of all work in the yard. He obtained a form dated July 21, 1944, from the coordinator (evidently an official connected with the War Shipping Administration) carrying the C. M. P. allotment serial number, calling for the drydocking of the vessel and some normal underwater repairs. That was then *followed* up by a survey for some of the *owner's* repairs *after* the vessel arrived in the yard. [Ap. 326-328.] It was the intention of the War Shipping Administration to allocate the ship to the Navy and the shipyard did certain extensive repairs and modifications required by reason of the anticipated use of the vessel by the Navy. That work was done simultaneously with "the owner's repairs." The Bethlehem Steel Company billed the repairs ordered by the War Shipping Administration to the agency. [Ap. 330-331.]

J. J. Schleef, chief engineer of the SS. Frank G. Drum, called as a witness by appellant, testified as follows:

> I am familiar with the fire fighting equipment on the vessel at the time of the accident at Bethlehem Steel Company dock. There was never any hydrant on the bulkhead immediately aft of the bunker tank

we are talking about. The first hydrant on the main deck is forward of the pump room. The one aft is in the alleyway so that there was no hydrant or hose anywhere along that bulkhead; there was no fire hydrant attached to that bulkhead or on that bulkhead. The nearest fire hydrant was underneath the catwalk and to the starboard side of the catwalk at point marked "X-S" [referring to Libelant's Exhibit 2]. There were no fire extinguishers belonging to the ship on any weather decks or outside. They are all in the top and bottom alleyways, the 'midship house and under the forecastle head; none in any place where they would be exposed to any sea or fog or anything of that kind. [Ap. 416-419.]

There were no permanent light fixtures which belonged to the ship which could have been used to illuminate this (port) bunker hatch. A temporary portable light would have to have been put there. [Ap. 423.]

I was aboard the vessel the night Richardson was injured. I was walking back and forth on the poop deck forward of my quarters, on the starboard side, one deck higher than the main deck, in the after part of the ship. From where I was walking up and down I happened to see him come aboard and I saw him crossing the top engine room grating at the time. I had gone into the engine room to tell the oiler on watch to see that the boilers were dry and to pump them if they were not and that is when I saw him going from the starboard side to port. He entered the port passageway from the engine room grating, the door leading into the port alleyway. At that time I had no actual knowledge, or personal knowledge,

of the fact that this (port) bunker hatch was open. I had observed the shipyard workers around that bunker hatch from time to time in the daytime, while they were working, and I had an opportunity to observe them. I saw that the tank top was open. [Ap. 423-425.]

On August 6, 1944, shortly after I got back on deck "with the bos'n" the bos'n heard a voice hollering for help from the tank. We went over to the port bunker hatch and helped the boy out. At the time I got there the bunker hatch was wide open, up against the bulkhead. There were no lights there and no ropes around it. [Ap. 426-247.]

Right after the accident happened there was a light in place there and the hatch was put back on the support and a rope put around it. The light and putting the hatch down on the stiff leg wasn't done by the ship's crew. It was Bethlehem's men because I recognized the temporary light man. When our lights went out at night in the quarters, we were to call for the temporary light man because it was up to them (Bethlehem Steel Company) to furnish the lights. I did not call for the temporary light man in this case because that light didn't interest me. [Ap. 431.]

The closest light in the port passageway to the opening of the door at the forward end of the port passageway (the one Richardson last used) was 15 or 16 feet aft of the door. That light furnished no illumination for the surface of the deck immediately outside of the hatch through which you make exit from that port passageway. No light would shine because at the time, this was during the war and we had shields on those permanent lights. They all had

the wire guard and we shielded them with metal or tin so it wouldn't reflect out on the deck; so that the passageway in that particular place is quite dark and there would be no light out on the deck immediately outside of that hatch which would illuminate the deck at all; no illumination. [Ap. 433.]

I didn't see Richardson after he left the engine room and went into the port alleyway. I didn't see him again until after we hauled him out of the tank. [Ap. 436.]

I came aboard about 3 o'clock Sunday afternoon. The accident happened somewhere around 9:30 P. M. I went ashore about 8 o'clock that Sunday morning. I was not aboard the ship at 3:30 Saturday afternoon, August 5th, when Bethlehem quit work. [Ap. 436-437.]

During the time from 3 o'clock Saturday afternoon, August 5, 1944, up until Sunday night at 9 or 9:30 I had not at any time gone in or come out of the aft port entrance. I had not been at or near or in close proximity to the port entrance passageway. The first time I was on the port side was when I heard the boy hollering for help. I had no occasion to go to the port side. All I was interested in is what happened in the engine department. My job is to stand security watches and to see that the ship doesn't sink or that the bilges fill up and the like of that. [Ap. 438.]

There was a bos'n on board and his duties, on security watch, are mostly to see that the lines are kept tight so that she (the vessel) doesn't break away from the dock and the like of that. [Ap. 438-439.]

We knew that workmen who cleaned the port bunker tank came into the yard on July 26th. I couldn't say whether it was the Ship Service people who took the rods off the hatch. I know it wasn't the ship's crew because none of them worked there. [Ap. 450-451.]

Asa Humble, called as a witness by appellant, testified as follows:

I did not at any time know that the port bunker hatch was left open while the ship was in the shipyard. I do not recall of ever having seen the port bunker hatch open at night while the ship was in the repair yard before this Coast Guardsman fell into it. I was aboard on the night of the accident in the capacity of a security watch, deck officer, third mate. [Ap. 452-453.]

After the accident happened the port bunker hatch was roped off and a light was placed over it. I don't recall who did it but I did not order the deck force to do it. I gave no orders to anybody in the crew to do anything like that. There was nobody aboard excepting me who could have issued such an order to the deck department that night. There was no other member of the deck department who had supervisory capacity over the crew members of that department. I was the only officer aboard, so far as the deck department was concerned. [Ap. 453-454.]

I had no occasion to go near this particular bunker hatch at any time while the vessel was in the shipyard and to my knowledge there was no work done by any members of the crew at or about that port bunker hatch during the time the vessel was at the shipyard. [Ap. 456.]

Albert D. Vanover, called as a witness by appellant, testified as follows:

> I at no time gave any orders to any members of the deck department to take any ropes away from the port bunker hatch. I was second mate. I had no personal knowledge of the fact that the port bunker hatch was open. I had nothing to do with the repairs.
>
> I know where the fire extinguishers are located on that vessel. They were always inside. [Ap. 463.]

Adrian Rolland Frederick, called as a witness by appellant testified as follows:

> I was chief officer on the SS. Frank G. Drum. I know the position and condition of the port bunker hatch on the Frank G. Drum at the time the ship was taken into the Bethlehem Steel Company shipyard. I gave the orders to secure it. The hatch, at the time the ship was taken into the shipyards, was resting on a leg attached to the lower side of the hatch itself. This leg held the hatch open at about 45 degrees; in other words, about halfway open. Besides this there was a ship's two inch line attached to the bulkhead, laid around this hatch and fastened to the after side of the pump house. While it was only a light line it would prevent anybody from accidentally falling into the hatch. In other words, it was just simply a safety measure in case somebody might want to get down there. The port bunker hatch was in the condition I have told you about up to the time the Bethlehem Company started to do work on that ship. That safeguarding was not removed by any member of the ship's crew. I had

charge of my bos'n and crew and there is only certain work the crew can do in a shipyard. There are a number of things that the crew wouldn't do in a ship on account of the regulations. [Ap. 465-467.]

I wasn't on board on Sunday evening. I wasn't on board on Sunday night at all. [Ap. 468.]

I didn't see anybody actually take the rope down that I have spoken about or lift the hatch cover back from the stiff leg. All I know is that my gang didn't do it. I was not present when it was done and didn't order anybody to do it. [Ap. 471.]

The deck men on board the ship were under my control; I gave them orders as to what they should do. I gave my orders to the bos'n. [Ap. 472.]

I make it a habit while I am on board a ship to be on deck at all times when I am on duty and I must have seen that hatch several times during that day (Saturday, August 5, 1944), and when I did there was always some of the yard men working around it or in it. As they had charge of that hatch, I didn't consider it my duty in any way, manner or form, to interfere in any way and I left it up to them entirely. I left it up to them to leave the hatch the way they found it, or I supposed they would anyway. [Ap. 475.]

I was aboard the vessel on Saturday, August 5th, from 8 A. M. until 3:30 P. M. I saw the shipyard people leave. The fact is I followed them off. [Ap. 474.]

I considered it part of the duties of a mate on board the ship to see that there was no fire hazard and that the ship is secured and that all fire-fighting equipment is ready for instant use, and that is what

I did. My duty also to the owner of the vessel would be to see that no condition was permitted to exist which would endanger the safety of the *ship*. When I talk about safety of the ship I mean the ship itself and not whether the ship in safe for Coast Guardsmen; whether the ship *itself* is in danger. [Ap. 476.]

If we assume that the shipyard had been working on the ship and they had taken away a long section of railing alongside of the ship and had failed to put up any chain or any rope along there so that the side of the ship was open and anybody walking across it would fall down into that place and I came on board the ship and found that condition, my testimony would be that I wouldn't do anything about it if the yard crew was doing work there or near it or coming back. As to this hatch, I didn't know whether they were coming back at 12 o'clock at night, 8 o'clock or any other time. All I knew was they had knocked off and left the hatch open and I assumed they were coming back to work that night. I was not on the ship on Sunday. The next time I came back to the ship was Monday morning. [Ap. 476-477.]

Oscar Bengston, called as a witness by appellant testified as follows:

I was the master of the SS. Frank G. Drum in charge of the vessel when it was brought into the Bethlehem shipyard at San Pedro. While the vessel was at sea the port bunker hatch was cleaned out, washed out. After it was cleaned out the tank lid was left on its support, at about a 45 degree angle, and there was some rope stretched around it also.

That was the condition of that bunker tank and the hatch when the ship was brought into the shipyard and it remained in that condition up until the time the shipyard workers commenced working on it. [Ap. 479.]

The location of the fire extinguishers on that vessel were. There were some under the forecastle head, some in the 'midships house, some in the passageway, on the poop deck and engine room and fire room. There were no portable fire extinguishers belonging to the ship, of any kind at any place where they would be exposed to the weather. [Ap. 479.]

The closest fire hydrant which was located on the main deck, closest to the forward bulkhead of the after house, was 10 feet forward of the pump room. [Ap. 479-480.]

The vessel was on a time charter to the War Shipping Administration at the time it was in the yard. [Ap. 480.]

"Q. By Mr. Gallagher: Captain, how long was that vessel withdrawn from navigation in 1944?

Mr. McHose: What do you mean by 'withdrawn from navigation'?

Q. By Mr. Gallagher: While it was in the shipyard being repaired, it wasn't being navigated? A. It wasn't possible to navigate it.

Mr. McHose: Do you mean how long was it up in the shipyard?

Q. By Mr. Gallagher: How long was it in the shipyard, without any power, without its machinery in operation? A. Between three and four weeks." [Ap. 489.]

Appellee Richardson testified, in so far as his testimony is material or relevant on this appeal, as follows:

> My Commanding Officer, Lieutenant Gregory, at 8 o'clock p. m. on August 6, 1944, told me to go aboard all vessels in Bethlehem Steel (Company shipyard) and make an inspection; looking for fire extinguishers, hoses, and to take a report from the mate sometime when I was on the ship; no other duties. [Ap. 154-155.]
>
> When I got those orders I went to the Bethlehem Steel gate showed my I. D. card, signed the log and went in at the gate. Then I went aboard the Frank G. Drum. [Ap. 155.]
>
> I went up the gangplank. There was an electric bulblight fastened to the side of the ship, the ship's shell, right at the top of the gangplank. There were lights on the dock. There was no other light that I saw on the ship. When I got onto the ship the first thing I did was I stopped and glanced around to see if I could see anyone on deck; not seeing anyone, I walked into the starboard passageway. [Ap. 157.]
>
> My point of exit from the port passageway is "X-2" on Libelant's Exhibit 2. I am indicating I went through the opening at the end of the port passageway, turned to the right, and this little object which is shown to be a space 4 feet by 6 feet, is the hatch down which I fell. The hatch is marked "X-3" on Libelant's Exhibit 2. [Ap. 205.]
>
> My purpose in walking from "X-1" [the main deck at the top of the gangway, Libelant's Exhibit 2] over to "X4" [forward entrance of starboard pas-

sageway, Libelant's Exhibit 2], and going through this lighted passageway over to "X-2" was to make a general inspection. [Ap. 207-208.]

The main deck was dark when I stepped out from the passageway. There was a coaming or a raised threshold that I had to step over in getting out of the passageway from the port side. [Ap. 208.]

My purpose in stepping from the lighted passageway on to the main deck was for general inspection of the main deck. After I stepped from the doorway I took a step and a half or maybe two steps before the accident. [Ap. 213.]

There were no lights at all near that open hatchway. I was not able to see that open hatchway by looking down. [Ap. 213.]

When I set my left foot down I turned to the right, with my left foot on the deck; and, as I turned to put my right one down, I fell in the hold. My foot did not come in contact with any object prior to my falling into the hold. [Ap. 214-215.]

(NOTE: The uncontradicted evidence in the case shows that the upper edge of the after coaming of the port bunker hatch was 8 inches above the surface of the main deck and this fact is important for the reason that when a person takes an ordinary step the sole of the shoe is not raised high enough to clear such an obstruction.)

My purpose in turning to the right as I came out of the door was to inspect for fire extinguishers and fire hose.

(NOTE: The attention of the Court is directed to the fact that there were no fire extinguishers or any fire hose which could have been inspected in the vicinity of

the route which the appellee Richardson voluntarily chose, without telling anybody aboard the vessel, or any place else, that he intended to roam around on the dark deck of a vessel under repair at a shipyard.)

Up to that point I had not seen or found anybody on the ship. [Ap. 215.]

I was on duty out here (Harbor area) 4 to 5 months before this accident happened, first going on duty at Terminal Island on February 10, 1944. During that period of time my duties called for me to go aboard and inspect ships. I was down along the waterfront there from the time I began my duties until this accident happened. During that time I boarded a considerable number of ships and made inspections similar to the inspection I intended to make the night of the accident. [Ap. 217.]

I had boarded vessels at Bethlehem shipyard on previous occasions and had gone on board vessels which were undergoing repairs. I knew that the Frank G. Drum was in the Bethlehem yard undergoing repairs the night I boarded her. I had been on board other tankers on previous occasions and I am generally familiar with the deck arrangement of a tanker. I know what a catwalk is. A catwalk is an upper walkway, about 6 feet above the main deck. The purpose of the catwalk is to walk over, to enable people to get from the after end of the ship up to the forward end of the ship without going along the main deck. That catwalk has chains or ropes alongside of it so you can walk along safely. On the deck of a tanker there are a great many pipe lines. Those pipes are large pipes that are used

in pumping oil and other commodities from one tank to the other of a tanker. They are all various sizes and get to be fairly good sized. Respondents' Exhibit A I recognize as the deck of a tanker and that is something similar to the deck of a good many tankers that I boarded when I was making an inspection. The pipes shown here are similar to the pipes that are common on the decks of tankers. That object in the center of the picture with a wheel on it is a valve. [Ap. 217-219.]

This object beside the valve is a hatch; a means of getting down into the compartment that is below the deck. I have seen these hatches on many vessels that I have boarded (maybe not in that particular place) but in various places on the decks of ships. I know that in a tanker there are a great many different compartments in which commodities are carried. [Ap. 219-220.]

There was not supposed to be a certain number of fire extinguishers aboard a ship. I didn't count the number of fire extinguishers on board. When I say fire extinguishers I mean there are several different kinds; ones you can use just by hand, carrying them around, and then there are some that stand erect, big ones. [Ap. 221-222.]

I do not recall finding any fire extinguishers when I walked through the passageway. I expected to find fire extinguishers along that bulkhead and up by the side of the catwalk. Referring to Respondents' Exhibit A, assuming that that is the forward end of the bulkhead, on the after house of the Frank G. Drum, I don't see any fire extinguishers on that

photograph or any place where fire extinguishers might have been kept. [Ap. 223.]

The ordinary way to enter the catwalk is the deck above the deck where I was. Fire extinguishers that were along the catwalk would be on the deck above where I was. [Ap. 225.]

When I was walking through the passageway of the vessel I don't remember whether I saw any fire extinguishers. It is customary to have fire extinguishers in the passageway of a vessel such as this. If there were fire extinguishers there I saw them; but I don't remember now. I don't remember if I saw any hose in the passageway. [Ap. 226-227.]

I didn't have may mind made up where I was going to proceed after I went out the opening onto the deck; no definite place; just maybe to the bow of the ship and back over to the gangplank. [Ap. 227.]

I had no prescribed or set method of going through the ship. I could go any place any time I wanted to. It was left up to my judgment as to how I would make an inspection. I didn't talk to anyone on board the ship before the accident happened. I didn't ask anybody to turn on any lights for me before I went on the deck. I didn't see anybody to tell. [Ap. 229.]

When I pushed the canvas back, the light showed just outside the door, that is, the space where I set my left foot down, the rest of it was dark. The deck itself was dark when I went on it. The only place I could see was the place where I put my first step. [Ap. 229.]

I am now receiving pay from the United States Government, approximately $41.00 each month. [Ap. 231.]

When I entered the yard of the Bethlehem Company I had to go through a gate. I had been in that yard prior to that night on eight or ten occasions, maybe more. [Ap. 231-232.]

I remained on the premises of the Bethlehem yard up until the time I walked aboard the ship. From the gate to the place where I got on the ship I walked from 75 to 100 yards. As I approached the ship I came alongside the bow of the ship first. It was up against the dock. As I walked along that 75 yards, before getting to the ship I couldn't see the ship until I got up pretty close. When I walked up the gangway the lighting conditions I observed before I went into the passageway were a light at the gangplank and lights on the dock. The light at the gangplank was the only one I saw on any part of the forward portion of the ship when I boarded it. You couldn't see on the port side of the ship but the starboard side, by the lights from the dock, you could see. At the time I boarded the ship, the lights from the dock illuminated the starboard side of the deck and I could see plainly on that side of the deck if I wanted to walk on it. [Ap. 231-233.]

When I went down the starboard passageway I didn't stop any place before I made my turn (toward the port side.) I was walking continuously from the time I entered the forward end of the starboard passageway up until the time I stepped into the hatch. I didn't open any of the doors to any of

the quarters in the starboard passageway or along the port passageway. [Ap. 233-234.]

You find the officer's quarters up on the upper deck, the one above the main deck, most of the time. [Ap. 235.]

The manner in which I could inspect a dark place without a flashlight or some means of illumination was, up over your head, "where them fire extinguishers and fire hose would ordinarily hang, you could see up high where they were, but down below there was a shadow, and that is the way I expect I found it." I had no light with me. I do not usually carry a flashlight.

"Q. Was it your practice to roam in ships in pitch darkness? A. There wasn't many ships that was pitch black dark." [Ap. 234-235.]

From my experience in walking along tankers, I knew that I was about to run into hatches and pipes and valves and all sorts of machinery, "but you could take your time going over." When I stepped out of the port passageway I left this canvas flap closed behind me and at that time you could see lights on the dock but you couldn't even see a foot ahead of you about the surface that I intended to walk on. [Ap. 236.]

When I first stepped out I was facing forward of the ship, when I set my left foot down. Then I turned to the right. I brought my right one out of the passageway. My left foot was right where I set it down, so the only foot that I moved at all after I placed my left foot out on the deck, up to

the time I went into the hatch, was my right foot. [Ap. 237-238.]

When I brought my right foot out the curtain closed behind me as I brought it out so that everything was dark out there on the surface of the deck as soon as it closed behind me and right then I was blinded to a certain extent. [Ap. 367.]

When I got on that particular tanker that night it appeared to me that it was a different type ship than I was used to. [Ap. 368.]

Appellee Richardson introduced in evidence certain Interrogatories directed to Appellant Tide Water Associated Oil Company, together with the Answers thereto. They are set forth in the Appendix G, pages 18-23.

From the testimony and evidence hereinabove referred to it is obvious that there is no foundation whatever in the record supporting the finding of negligence on the part of appellant, the finding of lack of negligence on the part of Bethlehem Steel Company, the finding that Bethlehem Steel Company was not in complete control of the vessel, the finding that appellant had opened the port bunker hatch, the finding that appellee Richardson was an invitee of appellant, the finding that appellant knew that appellee Richardson was coming aboard the vessel, the finding that appellee Richardson was not guilty of negligence proximately causing or contributing to his own injury, or the finding that appellee Richardson did not assume all risk of injury.

It is likewise obvious from the foregoing testimony and evidence that the trial court erred in the conclusions of law reached by the trial judge and in making and

entering a final decree against appellant and in favor of the appellees.

Appellant particularly points out the fact that appellee Richardson has at all times since his discharge from the Coast Guard been receiving a pension of $41.00 per month based on a 30% disability and that, presumably, he received his full salary as a seaman first class from the date of the accident until the date of his discharge from the Coast Guard. Therefore the findings of the court with reference to Richardson's loss of earnings diminution in future earning capacity are and each thereof is without substantial support in the record. Richardson, according to the judgment of the trial court, will, if the judgment is affirmed, be receiving at least a partial double recovery. In any event, it cannot be contended that he has suffered a permanent loss of earning capacity based on a 30% disability without giving the appellant credit for the $41.00 a month which Richardson has been receiving and will continue to receive from the Government. One of the reasons for awarding Richardson the pension was to compensate him for future loss of earning capacity.

There cannot be any doubt about the fact that Richardson was guilty of negligence proximately causing or at least contributing in a very substantial percentage to his injury. Therefore if any private entity was guilty of negligence proximately contributing to Richardson's injury the total sum of the damage would have to be diminished by that percentage thereof which was proximately caused or contributed to by Richardson's gross negligence.

III.

The Decree Against Appellant and in Favor of Appellee Bethlehem Steel Company Should Be Reversed.

Appellant has already set forth the essential bases upon which it is entitled to be relieved of and from all responsibility for the injury sustained by appellee Richardson. The evidence shows that Bethlehem Steel Company and the United States of America were in exclusive control of the vessel at all times while it was in the shipyard. Proctor for appellee Bethlehem Steel Company was very much concerned during the trial whenever any reference was made by proctor for appellant to the fact that the United States of America was the only entity which could have invited or permitted any person to come aboard the vessel. The testimony, written evidence, and the form of contract which it must be presumed was in full force and effect between the United States of America and Bethlehem Steel Company, illustrate very clearly the substantial basis for Mr. McHose's apprehension in this respect. Half-truths were presented by the appellee Bethlehem Steel Company to the trial judge. Appellee Bethlehem Steel Company concealed from the trial court the fact that it was acting pursuant to a contract between the United States of America and said appellee. It, at least impliedly, represented to the trial judge that the only written contract being performed by Bethlehem Steel Company, from the time the vessel was brought into the shipyard until the time of the accident, was the contract made up of a series of letters or sales orders between Bethlehem Steel Company and Tide Water Associated Oil Company. However, when a person speaks with reference to any subject, the substantive rules with reference to

fraud require such person to speak the whole truth with reference to the subject. If there is no duty to speak upon the subject at all and a party voluntarily opens a discussion of the subject matter, especially to a court, there is a legal duty to give the court all of the facts.

William A. Harrington, the assistant manager of Bethlehem Steel Company, testified that said company performed certain repair work to the tanker Frank G. Drum in July and August, 1944, and that the work was done pursuant to an *oral* agreement. [Ap. 326.] He also testified, ostensibly on the same subject and with reference to the so-called oral contract, that he got the approval of the coordinator (who could have been no one excepting an agent of the War Shipping Administration, although this was not explained to the court), for that work and had a *form* from the coordinator, dated July 21, authorizing Bethlehem Steel Company to *oversee* the repairs; that the only thing we (Bethlehem Steel Company) received from the Associated Oil Company was a form carrying the C. M. P. allotment serial number, calling for the drydocking of the vessel and some normal underwater repairs. That was then followed up by a survey for some of the owner's repairs *after* the vessel arrived in the yard. It happened that there was some damaged plates on the ship due to collisions with the Army and the Navy. [Ap. 327-328.]

The work being done for the United States of America was done simultaneously to doing the owner's repairs and the cost of doing those repairs was billed separately to the War Shipping Administration. [Ap. 330-331.]

The contract between Bethlehem Steel Company and Tide Water Associated Oil Company, according to Har-

rington, was not the contract pursuant to which the Frank G. Drum came into the Bethlehem Steel Company yard but that the Frank G. Drum was already in the yard when the contract was made. [Ap. 331-332.]

Conclusion.

It is respectfully contended that the appellant has sustained its burden of demonstrating that the final decree entered in favor of appellees Richardson and Bethlehem Steel Company and against appellant Tide Water Associated Oil Company was a miscarriage of justice and that this Honorable Court, in the exercise of its powers as an appellate court and as a court empowered to consider all of the facts on a trial *de novo,* should make and enter a final decree in favor of appellant Tide Water Associated Oil Company and to dispose of the issues as between the appellees Richardson and Bethlehem Steel Company, as the facts and law applicable thereto require.

Respectfully submitted,

Lasher B. Gallagher,

Proctor for Appellant.

"A mere licensee takes the property on which he enters as he finds it, enjoys the license subject to its concomitant perils, and assumes all the ordinary risks incident to the condition of the property and the manner of the conduct of the owner's business thereon. Accordingly the owner or person in charge of property is ordinarily under no duty to make or keep the property in a safe condition for the use of licensees; nor is he under any obligation to take any measures to protect mere licensees from injury due to the condition of the property, or from dangers incident to the ordinary uses to which the premises are subject. There is no duty to provide safeguards for licensees, even though there are dangerous holes, pitfalls, obstructions, or other conditions near to the part of the premises to which the permissive use extends. Neither is the owner or person in charge ordinarily under any duty to give licensees warning of concealed perils, although he might, by the exercise of reasonable care, have discovered the defect or danger which caused the injury. It follows that, as a general rule, the owner or person in charge of property is not liable for injuries to licensees due to the condition of the property, or, as it has been expressed, due to passive negligence or acts of omission. A fortiori, if licensees choose to make use of property although there is open and obvious danger thereon, the owner cannot be held liable for injury to a licensee because of such danger. It has been said, however, that the owner is under a duty not to expose a licensee to perils which could be avoided by

the exercise of reasonable care. The owner has been held not liable for injuries which a mere licensee on his property has received from excavations, a trench, a ditch, a cistern, a hole in the ground, an uncovered coalhole, a steam pit, a drain used to carry away hot water, a vat of hot water, elevators, unguarded or insufficiently guarded elevator shafts, floor openings, a hole in a bridge, an opening in the platform of a fire escape, uninsulated or insufficiently insulated electric wires, stairways, scantlings or pieces of timber on the floor of a hall of an office building, lack of light in a tenement house hallway, a pile of lumber, a heap of stones, a derrick, a moving crane, log rollways, a defective farm crossing over a railroad, a defect in the roof of a barn, a wire stretched across the outer edge of a lawn to keep off trespassers, a barbed wire fence along the boundary of the premises, the fall of a gravestone in a cemetery, a fire on the premises, an explosion of gas, the breaking of a machinery belt, or failure of a servant of the owner to use reasonable care in throwing a bale of hay from a loft."

45 Corpus Juris, 798-802, Sec. 203.

APPENDIX B.

". . . The plaintiff had alleged that the defendant had removed the supports and the defendant in his answer admitted that he had removed the support. As to this defendant the claim of negligence on his part is that he did not warn the plaintiff. But he was not bound to warn him of an obvious danger. (*Shanley v. American Olive Co.,* 185 Cal. 552, 555 (197 Pac. 793).) In other words, as we understand the plaintiff it is his contention that if the defendant or his employees removed the supports, and allowed him to enter without being warned, then the defendant was negligent. He cites many authorities to the effect that the plaintiff was an invitee, and that the defendant owed to him the duty of exercising ordinary care. Conceding, but not deciding, both propositions to be sound, they do not by any means determine the case. The argument of the plaintiff assumes that reasonable care to be exercised by the defendant of a building undergoing alterations and repairs is the same as reasonable care on a building that is entirely completed. As one of its instructions the trial court properly stated to the jury, among other things, 'Negligence is not absolute, but is a relative matter, depending upon time, place, persons, and circumstances.' The argument of the plaintiff entirely ignores that factor. In *Doremus v. Auerbach et al.,* 176 App. Div. 512, 163 N. Y. Supp. 239, at page 242, the court said: 'The fact that the building and the stairway were evidently in process of construction charges those concerned in its construction with a very different degree of care from that which attaches to the owner of a completed building . . .' In the case of *Cole v. L. D. Willcutt & Sons Co.,* 218 Mass. 71 (105 N. E. 461, at page 462), the court said: 'But the plaintiff contends

that the defendant had invited them to use the stairs, and so owed him a duty to keep them in safe condition for his use. If there was such an invitation, it was merely to use them in the condition in which they were with whatever work was openly and plainly being done upon them.' In *Gainey v. Peabody et al.,* 213 Mass. 229 (100 N. E. 336), the court said: 'The mere existence of a hole in the floor of a building in process of construction is in itself no evidence of negligence. It is one of the conditions which, apart from statutory obligation to guard, must be anticipated by anybody working there.' In the case of *Holland v. Turner,* 189 App. Div. 566 (178 N. Y. Supp. 382), the court was considering a case brought by an injured workman. He was working on a building under repair. The carpenters had torn up the floor in two different places. In one place the side supports had been removed. The plaintiff attempted to cross on the joists but one of the joists tipped over and he suffered the injury. On page 383 (of 178 N. Y. Supp.) the court said: 'Instead of taking this safe path, he chose to make a short cut, and pass over joists from which the flooring had been taken up, and from which the side supports had been taken away. I can find no evidence of negligence on the part of the defendant, and abundant evidence of contributory negligence on the part of the plaintiff. If this were the only pathway to the head of the stairs, and persons had occasion to go up and down the stairs, a different question might be presented; but defendant was proceeding to do just what he was engaged to do, taking down these joists in order that he

might replace the stairway in a different position.' In the case of *M. A. Long Co. v. State Acc. Fund,* 156 Md. 639 (144 Atl. 775), the court was considering an accident which occurred in a building under the course of construction. One of the workmen stepped on a joist that had certain knots in it. It broke and he was injured. On page 780 (of 144 Atl.) the court said: 'The question in this case, therefore, in the final analysis, depends upon whether the appellant did or left undone anything which resulted in injury to Lappielly, which the average careful and prudent man would not have done or left undone under such circumstances. If the average prudent and careful man would have done what the appellant did in this case, there is no actionable negligence on the part of the appellant, even though an accident occurred which resulted in Lappielly's injury.' Continuing on page 781 (of 144 Atl.) the court quoted with approval: ' "Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, *not of danger but of negligence,* and the unbending test of negligence in methods, machinery, and appliances is the *ordinary usage of the business.* No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the standard of the average prudent man . . ." ' *Lentz v. Allentown Bobbin Works,* 291 Pa. 526 (140 Atl. 541), is helpful. The plaintiff took a contract to repair the defendant's roof. In doing his work he leaned on one of the boards, it broke, and he fell to the ground and was injured. The break disclosed that the board was rotten, a fact not previously

known to plaintiff or defendant, and so far as appears not discoverable by any superficial examination. At page 542 (of 140 Atl.) the court said: 'The mere breaking of the board did not prove negligence (citing cases) and beyond that nothing was shown, except the condition of the board disclosed by the break. To hold the employer or property owner liable under such circumstances would place upon him an unreasonable burden which the law does not do. He is only required to use ordinary care to protect those lawfully upon his premises. (Citing cases.) This degree of care does not place upon the property owner the practically impossible task of testing every roof board before removal of the old covering to make way for the new.' In *Shanley v. American Olive Co.,* 185 Cal. 552, 555 (197 Pac. 793), the court said: 'The responsibility of such owner for the safety of such person in such a case is not absolute; he is only required to use ordinary care for the safety of the persons he invites to come upon the premises. If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger. But such owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. He is not required to give to the invitee notice or warning of an obvious danger. (29 Cyc. 471; 26 Cyc. 1213.)"

Ambrose v. Allen, 113 Cal. App. at 113-115.

APPENDIX C.

"Plaintiff relies for reversal of the judgment in favor of defendant P. J. Walker Company and Owens-Illinois Pacific Coast Company upon the proposition that *the foregoing facts disclose that said defendants were negligent in maintaining the roof on the building above described, in that the corrugated iron roofing adjacent to and below the corrugated glass roofing which formed the skylight was not fastened at its upper end in any manner and that as a result thereof when plaintiff stepped upon it it pulled away from the purlin and permitted him to fall to the floor of the building.*

"This proposition is untenable. The rule is established in California that an invitee to an incompleted building in process of construction is invited to use such building in its then condition. In *Ambrose v. Allen,* 113 Cal. App. 107 (98 Pac. 169), a case where the facts were analogous to those in the present case, after an exhaustive review of the authorities from other jurisdictions Mr. Justice Sturtevant at page 113 quoting from *Cole v. L. D. Willcutt & Sons Co.,* 218 Mass. 71 (105 N. E. 461, 462) thus states the rule: '. . . But the plaintiff contends that the defendant had invited him to use the stairs, and so owed him a duty to keep them in safe condition for his use. If there was such an invitation, it was merely to use them in the condition in which they were with whatever work was openly and plainly being done upon them.'

"Since the authorities supporting the rule just mentioned and the reasons therefore (*sic*) are fully set forth in *Ambrose v. Allen, supra,* it is unnecessary for us to further discuss this subject. Suffice it to say that under the rule above stated plaintiff has failed to show any actionable negligence upon the part of defendant P. J. Walker and Owens-Illinois Pacific Coast Company."

Kolburn v. P. J. Walker Co., 38 Cal. App. (2d) 545 at 549.

APPENDIX D.

"Whether the railroad companies may be held liable for Hunter's act depends not upon the fact that he was their servant generally, but upon whether the work which he was doing at the time was their work or that of another, a question determined, usually at least, by ascertaining under whose authority and command the work was being done. When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former. This rule is elementary and finds support in a large number of decisions, a few only of which need be cited. In *Standard Oil Co. v. Anderson,* 212 U. S. 215, 220-225, this court said:

" 'The servant himself is, of course, liable for the consequences of his own carelessness. But when, as is so frequently the case, an attempt is made to impose upon the master the liability for those consequences, it sometimes becomes necessary to inquire who was the master at the very time of the negligent act or omission. One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation.

* * * * * * * * *

" 'To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking.

* * * * * * * * *

" 'In many of the cases the power of substitution or discharge, the payment of wages and other circumstances bearing upon the relation are dwelt upon. They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control.' "

Denton v. Yazoo & M. V. R. R. Co., 284 U. S. 305 at 308-309.

APPENDIX E.

"Commissioned, warrant, and petty officers of the Coast Guard are hereby empowered to make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas, and the navigable waters of the United States, its Territories, and possessions, except the Philippine Islands, for the prevention, detection, and suppression of violations of laws of the United States. For *such* purposes, such *officers* are authorized at any time to go on board of any vessel, subject to the jurisdiction, or to the operation of any law, of the United States, to address inquiries to those on board, to examine the ship's documents and papers, and to examine, inspect and search the vessel and use all necessary force to compel compliance. . . ."

Title 14 U. S. C. A., Sec. 45.

Sections 46, 47 and 48 of the same title read as follows:

"The officers of the United States Coast Guard, insofar as they are engaged, pursuant to the authority contained in section 45 of this section, in enforcing any law of the United States, shall—

(a) Be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and

(b) Be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law."

14 U. S. C. A., Sec. 46.

"The provisions of sections 45 and 46 of this title shall be in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers or any other officers of the United States."

14 U. S. C. A., Title Sec. 47.

"Any officer of the Coast Guard enumerated in section 45 of this title may be designated by the Commandant of the Coast Guard as captain of the port for such port or ports or adjacent navigable waters of the United States as he deems necessary to facilitate execution of the duties prescribed by sections 45-48 of this title."

14 U. S. C. A., Sec. 48.

APPENDIX F.

"ARTICLE 1. *Purpose.* The purpose of this contract is to establish the terms upon which the Contractor will provide berthing, drydocking, marine railway, shipyard, and other facilities, together with materials and services for effecting expeditious repairs, completion, alterations of and additions to merchant vessels of United States and other registry and portions thereof which may be ordered to the Contractor's plant or another location for the performance of work hereunder from time to time during the period of this contract.

ARTICLE 2. *Preliminary arrangements.* Whenever the Administrator desires the Contractor to effect the repair, completion, alteration of or addition to a merchant vessel of United States or other registry, the Administrator shall notify the Contractor of the nature of the work to be performed, the date proposed for delivery of the vessel to the Contractor, and the desired date for completion of the work by the contractor. Upon being so notified, the Contractor shall promptly advise the Administrator regarding its ability to accept the vessel and to perform the work as required. If satisfactory dates for commencing and completing the work are agreed upon, the Contractor shall make the necessary arrangements for receiving the vessel on the agreed date, and for berthing her alongside its wharves or in its drydock or on its marine railway, or in the vicinity of its plant, or other location where the work is to be performed, as required, such arrangements to be satisfactory in each case to the Repair Representative.

"ARTICLE 3. *Job orders.* As soon as practical after the arrival of the vessel at the Contractor's plant or in

the vicinity thereof or other location where the work is to be performed, the items of work which it is desired to accomplish on such vessel shall be inspected jointly by the Contractor and the Repair Representative and job orders setting forth the items of work to be accomplished shall be prepared by the Repair Representative. If inspection requires the opening up of machinery and equipment and its closing after inspection, a job order shall be prepared covering that work. Items of repair shall be set forth in separate job orders from those setting forth items of alteration, completion or addition and each job order shall specify in reasonable detail the repair or completion, alteration or addition necessary to be accomplished on an individual item. When a job order is agreed upon, it shall be signed by an officer or other authorized representative of the Contractor and by the Repair Representative. If additional work is to be done on such vessel, additional job orders shall be prepared and executed as provided in this Article.

"ARTICLE 4. *Performance.* (a) Upon the signing of a job order, the Contractor shall promptly commence the work specified therein and diligently prosecute the same to completion to the satisfaction of the Repair Representative.

"(b) The Contractor shall furnish electricity, compressed air, steam, fresh water, and flushing water to the ships as required by the Repair Representative and shall furnish for the use of maritime personnel tools and equipment, including falls, stage planking, cranes, scrapers, hose, paint pots and brushes as required by the Repair Representative in such quantities as required."

Standard Contract Forms of War Shipping Administration pp. 433-434.

"ARTICLE 8. *Entering and Leaving Dry Dock.* (a) The decision as to whether the vessel shall be docked at the appointed time shall rest solely with the commander of the vessel. The commander of the vessel shall approach the dry dock or marine railway in a fair manner and at a reasonable speed. The commander of a vessel under its own power shall have immediate charge of the vessel until the bow thereof reaches the dry dock sill or the entrance to the marine railway. The dock master shall then take charge and complete the docking, being assisted as necessary by the ship's forces until the vessel has been safely docked. In undocking, the dock master shall have charge until the bow of the vessel clears the dry dock sill or the entrance to the marine railway.

"(b) The Contractor shall have charge of a vessel not operating under its own power from the time the Contractor's or subcontractor's lines are secured to the vessel until such time as all Contractor's or subcontractor's lines are cast off."

Standard Contract Forms of War Shipping Administration p. 441.

"ARTICLE 9. *Plans, specifications, and manner of doing work.*

* * * * * * * * *

"(e) The Contractor shall exercise reasonable care to protect the vessel from fire under the prevailing circumstances. To this end the Contractor shall maintain a reasonable system of inspection over the activities of welders, burners, riveters, painters, plumbers and similar workers. particularly where such activities are undertaken in the vicinity of the vessel's magazines, fuel oil tanks or storerooms containing inflammable materials. Hose

lines shall be maintained in such number and as required by the Repair Representative between the vessel and the shore ready for immediate use at all times while the vessel is berthed alongside the Contractor's pier or in dry dock or on marine railway. All tanks under alteration or repair shall be cleaned, washed and steamed out by the Contractor as may be necessary and the Repair Representative shall be furnished with a gas-free certificate before any work is done on a tank. The Contractor shall maintain a fire watch on the vessel at all times which shall be satisfactory to the Repair Representative.

"(f) The Contractor shall place proper safeguards for the prevention of accidents, and shall put up and keep at night suitable and sufficient lights where necessary during the prosecution of the work and use its best efforts to prevent accidents or injury to persons or property."

Standard Contract Forms of War Shipping Administration pp. 442-443.

* * * * * * * * *

"(m) The Contractor shall indemnify and save harmless the Government and its agencies and instrumentalities, the vessel and the owner of the vessel, from all suits or actions and damages or costs of every name and description to which the Government and its agencies and instrumentalities, the vessel or the owner thereof may be subject or put by reason of injury (including death) to the person or property of another arising or growing out of the fault or negligence of the Contractor or any subcontractor, its or their servants, agents or employees."

Standard Contract Forms of War Shipping Administration p. 444.

"ARTICLE 22. *Plant protection.* (a) In addition to taking the ordinary precautions heretofore adopted by the Contractor for the guarding and protection of its plant and work, the Contractor shall provide, as may be required or approved by the Contracting Officer, special plant protection such as additional equipment, devices and watchmen for the protection of its plant and property and the work in process for the Government against espionage, sabotage or enemy action.

"(b) When directed by the Repair Representative, the Contractor shall deliver to the Repair Representative a list of items of additional plant protection deemed necessary for adequate plant protection, together with an estimate of the cost thereof. Such items of additional plant protection shall be those required by the circumstances under which this contract is being performed and must be directed against espionage, acts of war and acts of enemy aliens. The Contractor must provide without charge protection against the elements, including storms and high water, and take the precautions usually taken as prudent measures in shipbuilding or manufacturing plants against fire, theft, and other risks such as occur in the ordinary conduct of business."

Standard Contract Forms of War Shipping Administration p. 449.

APPENDIX G.

Interrogatory No. 1. Were the members of the standby crew employes of and paid by the Tide Water Associated Oil Company?

Answer No. 1. The members of the crew aboard the vessel were there merely as a security watch. These members of the crew were paid by Tide Water Associated Oil Company, a corporation.

Interrogatory No. 2. What is the name, rank, or rating at the time of the accident, and last known address of each member of the standby crew?

Answer No. 2. The name, last known address, rank and rating of the members of the security watch aboard at the time of the accident are: Asa H. Humble, 3rd Mate, 3660—47th St., San Diego, California; J. J. Schleef, Chief Engineer, 1275—12th Avenue, San Francisco, California; B. Bisnagno, Bos'n, Fort Jones, California.

Interrogatory No. 3. Which of the persons mentioned in question 2 were actually on duty aboard the SS Frank G. Drum at 2100 on August 6, 1944?

Answer No. 3. See answer to number 2.

Interrogatory No. 4. Who was the Captain of the SS Frank G. Drum on August 6, 1944, and what is his last known address?

Answer No. 4. O. Bengston, 1940 Anza Street, San Francisco, California.

Interrogatory No. 5. Who was in command of the SS Frank G. Drum on August 6, 1944?

Answer No. 5. The vessel was withdrawn from navigation.

Interrogatory No. 6. What were the duties of each individual member of the standby crew while the SS Frank G. Drum was at the Bethlehem Steel Company's repair yards?

Answer No. 6. To act as security watch.

Interrogatory No. 7. Were any members of the standby crew to inspect the ship for any reason while it was in a repair status?

Answer No. 7. The vessel had been delivered to the Bethlehem Steel Corporation's repair yards for annual repairs and inspection and there was no reason for the security watch to inspect the same.

Interrogatory No. 8. If the answer to the preceding question is "No," then, who was to inspect the vessel for fire hazards, leaks, sabotage, etc.?

Answer No. 8. There were no fire hazards aboard the vessel. All machinery was shut down. The hull was in good condition.

Interrogatory No. 11. Was the nature of the repairs being made on the SS Frank G. Drum such that the bunker hatch into which Richardson fell had to be uncovered on the evening of August 6, 1944?

Answer No. 11. Employees of the shipyard are the only ones who can tell the nature of repairs or why the bunker hatch was uncovered.

Interrogatory No. 13. Why was the bunker hatch into which Richardson fell open and uncovered at 2100 on August 6, 1944?

Answer No. 13. This question can be answered only by the persons who opened the hatch and left it open, none of whom was in the employ of this respondent.

Interrogatory No. 17. Was it customary for the ship's crew to leave a bunker hatch uncovered, unlighted, unguarded, and not roped off at night?

Answer No. 17. The vessel's crew had nothing to do with uncovering, or lighting or guarding or roping off the bunker hatch while the vessel was in the shipyard for inspection and repair.

Interrogatory No. 18. Were there any fixed lights on the SS Frank G. Drum that could have been used to illuminate the bunker hatch or surrounding deck area where Richardson fell?

Answer No. 18. No.

Interrogatory No. 19. Did the ship have any portable lights that could have been used for this purpose?

Answer No. 19. No.

Interrogatory No. 20. If the answer to the preceding question is "No," were such lights available at the Bethlehem Steel Company's repair yards?

Answer No. 20. This respondent does not know.

Interrogatory No. 21. Where were the members of the standby crew at the time the accident in question occurred?

Answer No. 21. Chief Engineer Schleef was standing on the starboard side of the poop deck. Bos'n Bisango was in the same place. Asa H. Humble, 3rd Mate, was in his quarters.

Interrogatory No. 22. Was there any requirement or regulation in effect on August 6, 1944, that some member

of the ship's crew should be stationed at or near the gang plank at all times?

Answer No. 22. Not that this respondent know of.

Interrogatory No. 23. Was there a member of the ship's crew stationed at or near the gang plank at 2105 on August 6, 1944?

Answer No. 23. No; excepting the two who were on the poop deck.

Interrogatory No. 24. Did the Tide Water Associated Oil Company know that the SS Frank G. Drum would be inspected by the United States Coast Guard while she was tied up at the repair docks?

Answer No. 24. The Tide Water Associated Oil Company knew that the statutes of the United States permitted certain designated persons in the Coast Guard to board the vessel any time such persons were ordered to do so by the proper authorities but has no information with reference to when such persons would board the vessel.

Interrogatory No. 25. If the answer to the preceding question is "Yes," did the Tidewater Associated Oil Company know that in making such inspections the Coast Guardsmen making the inspection could inspect the entire ship from stem to stern?

Answer No. 25. Tide Water Associated Oil Company had no power to restrain the Coast Guard from doing anything it undertook but would naturally expect any per-

son to use the usual and ordinary means furnished for moving from one part of the vessel to another.

Interrogatory No. 26. Had the members of the stand-by crew been told that the United States Coast Guard might inspect the SS Frank G. Drum while it was tied up at the repair docks?

Answer No. 26. No member of the security watch has so stated; therefore this respondent does not know.

Interrogatory No. 27. Had the SS Frank G. Drum ever been inspected by any members of the United States Coast Guard during the war prior to this accident?

Answer No. 27. Respondent assumes so but has no actual knowledge thereof.

Interrogatory No. 28. If the answer to the preceding question is "Yes," had these inspections always been made by a Coast Guardsman of at least petty officer rating or by a detail under the immediate command of a Coast Guardsman of such rating?

Answer No. 28. Respondent does not know.

Interrogatory No. 29. Had the members of the ship's crew ever been told that a Coast Guardsman with a rating lower than petty officer was not authorized to board the vessel alone?

Answer No. 29. Respondent does not know.

Interrogatory No. 30. Did the Tide Water Associated Oil Company ever challenge the right of a Coast Guards-

man of less than petty officer rating to board the SS Frank G. Drum?

Answer No. 30. Respondent does not know what employees of this respondent may have done.

Interrogatory No. 31. Did the Tide Water Associated Oil Company ever take any steps to keep Coast Guardsmen of less than petty officer rating off the SS Frank G. Drum?

Answer No. 31. Respondent does not know what any employees of respondent may have done in this respect.

Interrogatory No. 32. Did the Tide Water Associated Oil Company ever protest to the Coast Guard authorities about Coast Guardsmen of less than petty officer rating boarding the SS Frank G. Drum unaccompanied by commissioned or petty officers. If so, please give the details.

Answer No. 32. No.

Interrogatory No. 33. Did a member of the ship's crew make a report of this accident to the Tide Water Associated Oil Company? If so, who?

Answer No. 33. The Master.

APPENDIX H.

ASSIGNMENTS OF ERROR.

Now comes the Respondent Tide Water Associated Oil Company, a corporation, and hereby assigns the following errors in the above entitled proceeding:

I.

The Court erred in finding that at all times mentioned in the libel Tide Water Associated Oil Company was in charge and control of and operating under time charter to the United States the tank vessel Frank G. Drum.

II.

The Court erred in finding that on August 6, 1944, the libelant was patrolling vessels located on navigable waters of the United States, including the Frank G. Drum.

III.

The Court erred in finding that libelant's duties included attending on board certain ships, including the Frank G. Drum, to inspect conditions thereon and make certain that port security regulations in effect were being observed and maintained.

IV.

The Court erred in finding that the respondent Tide Water Associated Oil Company knew that members of the United States Coast Guard would make such inspections of vessels, including the tank vessel Frank G. Drum at Los Angeles Harbor during the times mentioned in the libel.

V.

The Court erred in finding that at or about 9:10 p. m. on Sunday, August 6, 1944, libelant went on board the Frank G. Drum as a member of the United States Coast

Guard, pursuant to orders from his superior officers and in line with his duties, for the purpose of making such inspection.

VI.

The Court erred in finding that the contract for repairs was not a contract of bailment and that during the making of said repairs by Bethlehem Steel Company and while the vessel was at the repair yard, officers and members of the crew of the Frank G. Drum employed by Tide Water Associated Oil Company, remained on board, in charge and control of said vessel and engaged in various work and labor and maintenance simultaneously with the performance of repair work and labor by Bethlehem Steel Company.

VII.

The Court erred in finding that officers and members of the crew in control and charge of the Frank G. Drum and who were employees of Tide Water Associated Oil Company observed and knew that the port bunker hatch was open after the Bethlehem Steel Company ceased work on Saturday, August 5, 1944.

VIII.

The Court erred in finding that with the knowledge and approval of Tide Water Associated Oil Company's employees, on board and in charge of the Frank G. Drum, said port bunker hatch remained open the remainder of that day and night and all day Sunday, August 6, 1944, and until the time of the accident and injury to libelant at or about 9:10 p. m. August 6, 1944.

IX.

The Court erred in finding that at the time and place of the happening of the accident, Tide Water Associated

Oil Company knowingly, negligently, carelessly, and recklessly operated, conducted, controlled and maintained that portion of the Frank G. Drum on which the port bunker hatch was located, in that officers and members of the crew in charge of said vessel knowingly, negligently, carelessly and recklessly caused, maintained and permitted the said port bunker hatch to remain open, unguarded and in a dark condition without any illumination whatever to warn people, and particularly libelant, on board said ship that said hatch was in said open, unguarded, and unlighted condition, all of which was known to officers and members of the crew employed by Tide Water Associated Oil Company.

X.

The Court erred in finding that the accident and injury to libelant was solely and proximately due to the fault, negligence, and carelessness of Tide Water Associated Oil Company.

XI.

The Court erred in finding that "Tide Water Associated Oil Company was at fault and was careless and negligent at the time of the happening of the accident and injury to libelant in the following particulars:

"(a) That at the times mentioned in the libel and for a period of approximately thirty hours prior to the happening of the accident, it permitted the hatch, approximately four feet by six feet in size, leading to the port bunker tank of said ship, which bunker tank was approximately 36 feet in depth, to remain open and unguarded.

"(b) That at the times mentioned in the libel it permitted the hatch to the port bunker tank of said ship to remain in a dark and unlighted condition.

"(c) That it failed and neglected to have or place illuminated signs or any signs or notices whatever to warn people, including libelant, on or about said ship that said hatch was open, unguarded and unlighted.

"(d) That there were no precautions taken by Tide Water Associated Oil Company to warn or advise people, including libelant, on or about said ship that said hatch was open, unguarded, and unlighted

"(e) That Tide Water Associated Oil Company, having knowledge of the open, unguarded, and unlighted condition of said hatch, failed and neglected to have any person at or near said open, unguarded, and unlighted hatch to inform people, including libelant, that the same was open, unguarded, and unguarded, and unlighted.

"(f) That Tide Water Associated Oil Company knew that said vessel would be inspected by a member of the United States Coast Guard such as libelant, and notwithstanding such knowledge permitted said hatch to remain open, unguarded, and unlighted."

XII.

The Court erred in finding that at the time of the occurrence of the injury to libelant the Frank G. Drum and the port bunker hatch thereon, were in charge or control of Tide Water Associated Oil Company, and were not in charge or control of Bethlehem Steel Company.

XIII.

The Court erred in finding that at the time of the happening of the accident and injury libelant was aboard the Frank G. Drum as an invitee of Tide Water Associated Oil Company.

XIV.

The Court erred in finding that Tide Water Associated Oil Company, with knowledge of the existence of the dangerous condition of the port bunker hatch referred to in the libel, invited and permitted libelant to board said vessel for the purpose of making the inspection above referred to and that libelant while making said inspection and due to the negligence, carelessness and recklessness of Tide Water Associated Oil Company, did fall into said open hatch a distance of approximately 36 feet to the bottom of said port bunker tank, thereby damaging and injuring the libelant.

XV.

The Court erred in finding that as a result of the negligence of Tide Water Associated Oil Company libelant was hurt in his health, strength and activity, received a profound shock to his nervous system, and was made sick, sore and lame and was hurt about his head, limbs and body, and did receive a severe fracture of the femur causing permanent disability and from said injuries libelant suffered great physical pain and mental anguish, and has had pain and suffering in the past and will have pain and suffering in the future, all to his damage in the sum of $15,000.00.

XVI.

The Court erred in finding that libelant, due to said injuries, will suffer a permanent partial disability which has caused a loss in his earning capacity since his discharge from the United States Coast Guard, and will cause a permanent partial loss in his future earning capacity, all to libelant's further damage in the sum of $14,400.00.

XVII.

The Court erred in finding that it is untrue that the accident and damages and injuries sustained by libelant by reason thereof, were the result of an inevitable or unavoidable accident.

XVIII.

The Court erred in finding that it is untrue that the accident and damages and injuries sustained by the libelant by reason thereof, were caused or resulted by reason of any negligence of libelant.

XIX

The Court erred in finding that it is untrue that the accident, or the risk or the danger incident to the work in which libelant was engaged, or the risk or damage incident to the manner in which libelant was performing said work, or the risk or danger then existing at the place of the accident, including the risk or danger of personal injury of a nature or in the manner suffered by libelant, were open or obvious or apparent or well known to libelant, or a man of his experience or calling.

XX.

The Court erred in finding that it is untrue that libelant carelessly or negligently or recklessly or voluntarily placed himself in a position where he was exposed to the risk of danger and injury of the nature that occurred to libelant.

XXI.

The Court erred in finding that it is untrue that libelant was negligent in or about the premises.

XXII.

The Court erred in finding that it is untrue that the injuries suffered by libelant were solely or proximately or

in any degree whatever caused by recklessness or carelessness or negligence on the part of libelant.

XXIII.

The Court erred in finding that it is untrue that libelant was guilty of any contributory negligence or recklessness or carelessness.

XXIV.

The Court erred in finding that it is untrue that libelant assumed any risk or danger or the risk or danger of the injuries suffered by libelant.

XXV.

The Court erred in finding that it is untrue that at all or any times mentioned in the libel, the sole and exclusive right to control the operation of the Frank G. Drum was the prerogative of the United States or the Administrator, War Shipping Administration.

XXVI.

The Court erred in finding that at all times mentioned in the libel the Frank G. Drum was operated and controlled by and in charge of its owner, Tide Water Associated Oil Company.

XXVII.

The Court erred in finding that at the time of the accident and injury to libelant the Bethlehem Steel Company owed no duty to Tide Water Associated Oil Company or to any other person or concern to have or maintain any representative or employee on board said vessel.

XXVIII.

The Court erred in finding that any ship's light which would have illuminated the port bunker hatch was available to the officers or crew on board the Frank G. Drum or

could have been controlled by the officers and crew and those on board the Frank G. Drum.

XXIX.

The Court erred in finding that Bethlehem Steel Company did not have charge or control of the Frank G. Drum or of the port bunker hatch thereon, at the time of the injury to libelant.

XXX.

The Court erred in finding that it has not been established by the evidence that Bethlehem Steel Company was negligent in any way in connection with the performance by it of repair work on the Frank G. Drum pursuant to the contract of repair with Tide Water Associated Oil Company.

XXXI.

The Court erred in finding that it has not been established by the evidence that Bethlehem Steel Company or its employees were responsible for leaving the port bunker hatch open and unguarded and unlighted at the time of the injury to libelant.

XXXII.

The Court erred in finding that even if the evidence established that Bethlehem Steel Company or its employees did leave the hatch open and unguarded when work in the port bunker tank ceased on Saturday afternoon, August 5th, this did not create a dangerous condition during daylight, and the condition only became dangerous after it became dark by reason of failure by Tide Water Associated Oil Company to provide lights at the port bunker hatch or give any warning of the dangerous condition there existing.

XXXIII.

The Court erred in finding that lighting the portion of the ship around the port bunker hatch was within the control of and the duty of Tide Water Associated Oil Company, and not Bethlehem Steel Company.

XXXIV.

The Court erred in finding that even if it should be found that Bethlehem Steel Company was negligent in leaving the port bunker hatch open and unguarded when work ceased Saturday afternoon, August 5th, such negligence would not have been the proximate cause, but could only have been a secondary cause of the injury to libelant.

XXXV.

The Court erred in concluding from the findings of fact that at the time and place of the accident and injury to libelant, Tide Water Associated Oil Company was the owner and operator of and in full control and charge of the Frank G. Drum and the port bunker hatch thereon.

XXXVI.

The Court erred in concluding from the findings of fact that libelant, David Lawton Richardson, committed no fault or negligence in the premises.

XXXVII.

The Court erred in concluding from the findings of fact that libelant was on board the Frank G. Drum with the knowledge and consent of the owner, Tide Water Associated Oil Company, and at the time and place of the accident was an invitee of Tide Water Associated Oil Company.

XXXVIII.

The Court erred in concluding from the findings of fact that Bethlehem Steel Company was not a bailee of the Frank G. Drum at the time of the accident and injury to libelant.

XXXIX.

The Court erred in concluding from the findings of fact that Tide Water Associated Oil Company was negligent in that it knowingly permitted the port bunker hatch to remain open and unguarded at the time and place when and where libelant was injured.

XL.

The Court erred in concluding from the findings of fact that Tide Water Associated Oil Company was negligent in that it permitted the port bunker hatch to remain open and unguarded and in a dark and unlighted condition at the time and place when and where libelant was injured.

XLI.

The Court erred in concluding from the findings of fact that Tide Water Associated Oil Company was negligent in that it permitted the port bunker hatch to remain open and unguarded and in a dark and unlighted condition, and failed to warn libelant that such dangerous condition existed.

XLII.

The Court erred in concluding from the findings of fact that the negligence of Tide Water Associated Oil Company was the sole and proximate cause of the accident and injury sustained by libelant.

XLIII.

The Court erred in concluding from the findings of fact that Bethlehem Steel Company committed no fault or negligence in the premises and that even if the Court found Bethlehem Steel Company to have been negligent in leaving the port bunker hatch open when it ceased work on Saturday, August 5th, the Court concludes such negligence could not have been the primary or proximate cause of the accident and injury sustained by libelant, but could only have been a secondary cause, the primary cause being the negligence of Tide Water Associated Oil Company.

XLIV.

The Court erred in concluding from the findings of fact that the libel against Tide Water Associated Oil Company shall be sustained, and that libelant shall be granted a final decree solely against respondent Tide Water Associated Oil Company for damages in the total sum of $29,400.00, and for libelant's costs of suit herein.

XLV.

The Court erred in concluding from the findings of fact that the libel against Bethlehem Steel Company shall be dismissed and Bethlehem Steel Company shall recover from Tide Water Associated Oil Company its costs of suit herein.

XLVI.

The Court erred in failing to make a finding on the disputed allegation in Article Tenth of the Libel, that libelant's duties at said time and place as a member of the United States Coast Guard were to check upon guards on duty and make further checks on docks and ships to verify the reports of the Coast Guardsmen on duty and to make complete checkups on the docks and ships at said

Bethelehem Steel Company and that at said time and place the respondents knew or in the exercise of ordinary care should have known all of the duties of libelant as above set forth.

XLVII.

The Court erred in failing to find with reference to the disputed allegation in Article Eleventh of the Libel that at about the hour of 9:10 p. m. on August 6, 1944, libelant entered said ship, SS Frank G. Drum, for the purpose of inspecting said ship for the benefit of the respondents.

XLVIII.

The Court erred in failing to find on the disputed allegation that the respondents (which includes Bethlehem Steel Company) knowingly, negligently, carelessly, recklessly and unlawfully operated, conducted, controlled and maintained the SS Frank G. Drum and knowingly, negligently, carelessly, recklessly and unlawfully caused, maintained and permitted the hatch to the bunker of said ship to remain open and unguarded and in a dark condition without any illumination whatever to warn people on said ship that said hatch was in said condition and that all thereof was well known to the respondent Bethlehem Steel Company.

XLIX.

The Court erred in failing to find with reference to the disputed allegations in Article Twelfth that the accident was entirely due to the manifest incompetency, fault, negligence, carelessness and unlawfulness of respondent Bethlehem Steel Company, in the following particulars:

(a) At all times herein mentioned, the hatch to the bunker tank of said ship, which was approximately thirty-five (35) feet in depth, remained open and unguarded.

(b) At all times herein mentioned the hatch to the bunker tank of said ship was and remained in a dark condition without any illumination whatever.

(c) There were no illuminating signs or signs whatever to warn people on or about said ship that said hatch was open and unguarded.

(d) There were no precautions taken by respondent Bethlehem Steel Company to warn or let people on or about said ship know that said hatch was open and unguarded.

(e) Respondent Bethlehem Steel Company failed and neglected to have any person at or near said unguarded hatch to inform people at or near said hatch that the same was open and unguarded.

(f) That the respondent Bethlehem Steel Company permitted said hatch to remain open, unguarded and in a dark condition, all of which constituted a trap for people on said ship at or near said hatch.

(g) Respondent Bethlehem Steel Company knew that said ship would be inspected by a member of the United States Coast Guard and notwithstanding such knowledge permitted said hatch to remain unguarded and in a dark condition.

L.

The Court erred in failing to make any finding with respect to the disputed allegation in Article Thirteenth of the Libel that notwithstanding the knowledge and existence of the dangerous condition of the ship and the hatch thereon the respondent Bethlehem Steel Company invited and permitted libelant onto said ship for the purpose of making the inspection referred to in the libel.

LI.

The Court erred in failing to find on the disputed allegation in the Thirteenth Article that the respondent Tide Water Associated Oil Company invited and permitted the libelant onto the ship for the purpose of making the inspection referred to in the Tenth and Eleventh Articles and that the libelant while making such inspection did fall into the open hatch.

LII.

The Court erred in failing to find on the affirmative allegation in Paragraph III of the Answer of Tide Water Associated Oil Company that at all times referred to in the libel the said vessel was under requisition charter to the United States of America and that at all times mentioned in the libel said vessel had been withdrawn from navigation.

LIII.

The Court erred in failing to find on the affirmative allegation in Paragraph III of Tide Water Associated Oil Company's Answer that the said vessel, at all times mentioned in the libel, was an ocean vessel under the Flag or control of the United States and that the sole and exclusive right to control the operation, charter, requisition or use thereof was the prerogative of the Administrator, War Shipping Administration, as provided in and by Executive Order No. 9054, 7 Federal Register, 837, as amended by Executive Order No. 9244, 7 Federal Register, 7327, and that at none of the times or places referred to in the libel did said respondent have the right to control the operation or charter or requisition or use of said vessel.

LIV.

The Court erred in failing to make any finding with respect to the allegations of the Third Affirmative Defense of Tide Water Associated Oil Company that at all times referred to in the libel, libelant was a seaman of mature years, experienced in the employment in which he was then engaged and familiar with ships and ships' gear, machinery, working places, fixtures, appliances, equipment and appurtenances, and of their nature and functions being employed and used aboard vessels of the type of the SS Frank G. Drum.

LV.

The Court erred in failing to find affirmatively in favor of the allegations in Tide Water Associated Oil Company's Second Affirmative Defense.

LVI.

The Court erred in failing to find affirmatively in favor of the allegations in Tide Water Associated Oil Company's Third Affirmative Defense.

LVII.

The Court erred in failing to find affirmatively in favor of the allegations in Tide Water Associated Oil Company's Fourth Affirmative Defense.

LVIII.

The Court erred in failing to make any finding with reference to the disputed question whether the libelant was or was not an invitee of the Tide Water Associated Oil Company at the specific part of and location on the ship where the accident happened.

LVIX.

The Court erred in failing to make any finding with reference to whose servants, agents or employees removed the rope guards which were around the port bunker tank at the time the vessel was brought to the shipyard of Bethlehem Steel Company and whose servants, agents and employees removed the port bunker hatch cover from its supporting stiff-leg and arranged it so that it was in the position it occupied at the time of the accident.

LX.

The Court erred in failing to conclude that the libelant is not entitled to recover any sum whatever from the respondent Tide Water Associated Oil Company and that the libel should be dismissed with costs to said respondent Tide Water Associated Oil Company.

LXI.

The Court erred in failing to find that Bethlehem Steel Company was guilty of negligence proximately causing or proximately contributing to the injuries sustained by the libelant.

LXII.

The Court erred in making Final Decree in favor of libelant and Bethlehem Steel Company and against Tide Water Associated Oil Company.

LXIII.

The Court erred in ordering the libel against the respondent Bethelehem Steel Company dismissed.

Dated: September 5th, 1947.

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated Oil Company, a corporation

APPENDIX I.

RESPONDENT TIDE WATER ASSOCIATED OIL COMPANY, a corporation's EXCEPTIONS TO LIBEL IN PERSONAM.

Comes now the respondent, Tide Water Associated Oil Company, a corporation, and excepts to the libel herein as follows:

I.

Excepts to the sufficiency of the said libel upon the ground that it fails to allege any facts showing that the relationship of invitor and invitee existed between said respondent and the libellant.

II.

Excepts to the sufficiency of the said libel upon the ground that as a matter of law the facts alleged show at most that the libellant boarded the SS "Frank G. Drum" under a commission to board given by law and there are no facts alleged showing a breach of any duty which may have been owed by this respondent to the libellant under said circumstances.

III.

Excepts to the lack of distinctness in the allegations of the Fifth Article in that it is impossible for the respondent to ascertain from said allegations whether John One was a licensed officer of the SS "Frank G. Drum" or a member of the crew of said SS "Frank G. Drum."

IV.

Excepts to the allegations of the Sixth Article upon the ground that they lack distinctness with reference to John Five in that it is impossible to ascertain therefrom whether John Five was a licensed officer of the said SS "Frank G. Drum" or a member of the crew of said SS "Frank G. Drum"; and also upon the ground that it cannot be

ascertained from said allegations how John Five could be the agent, servant and/or employee of all of his co-respondents, said libel also alleging in the Fifth Article that the respondent John One was the agent, servant and/or employee of his co-respondents, including John Five, referred to in the Sixth Article.

V.

Excepts to the allegations of the Fifth, Sixth and Seventh Articles upon the ground that they lack distinctness in that in the Fifth Article John One is alleged to be the agent, servant and/or employee of his co-respondents; and in the Sixth Article John Five is alleged to be the servant, agent and/or employee of his co-respondents; and in the Seventh Article John Six is alleged to be the agent, servant and/or employee of his co-respondents; and it cannot be ascertained from the said pleading how each one of these respondents sued by fictitious names, to wit, John One, John Five and John Six could, at one and the same time, be the employees of each other and the servants and employees of each other.

VI.

Excepts to the Seventh Article in that the allegations lack distinctness with reference to the respondent John Six and it cannot be ascertained therefrom whether John Six was a licensed officer of the SS "Frank G. Drum" or a member of the crew of the SS "Frank G. Drum."

VII.

Excepts to the allegations of the Tenth Article upon the ground that they lack distinctness with reference to the libellant's alleged duties in that it cannot be ascertained what is meant by the allegation that the libellant's duties "were to check upon guards on duty and make further

checks on docks and ships to verify the reports of the Coast Guardsmen on duty and to make complete check-ups on the docks and ships at said Bethlehem Steel Corporation, a corporation; there being no allegation in the libel that any guards were on duty aboard said vessel.

VIII.

Excepts to the relevancy and competency of the allegation in the Eleventh Article that the libellant entered said ship "for the purpose of, among other things, inspecting said ship for the benefit of the respondents herein," in that said allegation is a conclusion.

IX.

Excepts to the relevancy and competency of the allegation in the Twelfth Article that the respondents "knowingly, negligently, carelessly, recklessly and unlawfully operated, conducted, controlled and maintained . . . the repair docks where said boat was docked," for the reason that there is no allegation of any fact showing a proximate causal connection between any act or omission with reference to the repair docks and any injury sustained by the libellant.

X.

Excepts to the relevancy and competency of the allegation in the Twelfth Article "that the accident herein complained of was entirely due to the manifest incompetency, fault, negligence, carelessness and unlawfulness of respondents," upon the ground that said allegation is a conclusion.

XI.

Excepts to the language in the Twelfth Article "among other particulars" with reference to alleged fault, upon the ground that said language is not sufficient to charge any specific negligent act on the part of the respondent and general Admiralty Rule 22 requires the libellant to propound and allege in distinct articles the various allegations of fact upon which the libellant relies in support of his suit.

XII.

Excepts to the relevancy and competency of the recital in subdivision (f) of the Twelfth Article—"all of which constituted a trap for people on said ship at or near said hatch," in that said recital is a conclusion.

XIII.

Excepts to the last allegation in the Twelfth Article, to wit, "There is negligence in other respects as will be shown upon the trial," upon the ground that said allegation lacks sufficiency and distinctness.

Wherefore, respondent prays that its exceptions be sustained and that if the libel is not amended within such time as this Court shall allow, if at all, said libel may be dismissed.

LASHER B. GALLAGHER,

Proctor for Respondent Tide Water Associated Oil Company, a corporation.

Memorandum of Points and Authorities in Support of Exceptions to Libel.

I.

Libellant, as a matter of law, is not an invitee.

Title 14 U.S.C.A., Sec. 45, provides that "commissioned, warrant and petty officers of the Coast Guard are empowered to make inquiries, examinations, inspections, searches, seizures and arrests upon the navigable waters of the United States for the prevention, detection and suppression of violation of laws of the United States. For such purpose, such officers are authorized at any time to go on board of any vessel, subject to the jurisdiction, or to the operation of any law, of the United States, to address inquiries to those on board, to examine the ship's documents and papers, and to examine, inspect and search the vessel and use all necessary force to compel compliance . . ."

The libel alleges that the SS "Frank G. Drum" was on navigable waters of the United States; that the libellant on the 6th day of August, 1944, was in charge of a detail of guards; that he boarded said vessel in his official capacity and in line with his duties. Under such circumstances it cannot be logically contended that the libellant was an invitee. The respondent had no possible right to refuse to permit the libellant to board the vessel. If it had refused to permit him to board the vessel he was authorized to use all necessary force to compel compliance. An invitation does not exist unless the alleged invitor has lawful power to permit or refuse to permit another person to enter upon real or personal property. How can it be contended that the libellant could have used physical force to accomplish his duty as a member of the armed forces of the United States in time of war in

boarding the said vessel and at the same time say that the respondent invited him to come aboard the vessel?

The only object for which the libellant could have boarded the vessel in the course of his duty as a member of the armed forces of the United States would be to prevent, detect and suppress violations of statutes of the United States. In other words, he comes within a group of persons who are in the same category as firemen and policemen.

"It has been held that a policeman or constable entering private premises in the performance of his duty is a mere licensee to whom the owner owes no common law duty to keep the premises safe, although the owner may be liable for an injury resulting from his neglect of a statutory duty with respect to the condition of the premises."

45 Corpus Juris, 794, sec. 199.

"A member of a public fire department who enters a building in the exercise of his duties is a mere licensee under permission to enter given by law, and the owner or occupant of the building does not owe to such person any duty to keep the premises in a safe condition."

45 Corpus Juris, 794, sec. 200.

In the libel there is no allegation of any fact showing any neglect of any statutory duty with respect to the condition of the SS "Frank G. Drum."

"In the majority of jurisdictions the rule is well settled that, in the absence of a statute or municipal ordinance, a member of a public fire department, who, in an emergency, enters on premises in the discharge of his duty, is a mere

licensee *under a commission to enter given by law,* to whom the owner or occupant owes no greater duty than to refrain from the infliction of wilful or intentional injury." (Emphasis added.)

13 A. L. R. 638.

Please see also: 141 A. L. R. 584, supplementing the annotation in 13 A. L. R. 637-638.

There is no allegation in the libel of any overt act on the part of the respondent.

Assuming, for the sole purpose of argument (in spite of the authorities hereinabove cited) that the libellant could have been an invitee of the respondent aboard said vessel, there is no allegation of any fact showing that he was invited to be in the particular part of the vessel where he sustained his injury. It is an elementary principle that a person may be an invitee in one part of premises and a trespasser or licensee in other parts. For instance, a passenger on an ocean-going liner is an invitee while using those parts of the vessel set aside for the accommodation or amusement of passengers. On the other hand, if a passenger, out of curiosity, roams around the engine room, even with the consent of the licensed officers in charge thereof, he would be a licensee. If he did the same act without the consent of the licensed officers, he would be a trespasser. Therefore, if it is legally possible for the libellant to have been an invitee of the respondent, he should allege facts showing that he was at the place of the accident as an invitee of the respondent.

The libellant fails to allege that he was using any passageway which was designed for the purpose of affording access from or to any part of the vessel.

II.

"A mere licensee takes the property on which he enters as he finds it, enjoys the license subject to its concomitant perils, and assumes all the ordinary risks incident to the condition of the property and the manner of the conduct of the owner's business thereon. Accordingly the owner or person in charge of property is ordinarily under no duty to make or keep the property in a safe condition for the use of licensees; nor is he under any obligation to take any measures to protect mere licensees from injury due to the condition of the property, or from dangers incident to the ordinary uses to which the premises are subject. There is no duty to provide safeguards for licensees, even though there are dangerous holes, pitfalls, obstructions, or other conditions near to the part of the premises to which the permissive use extends. Neither is the owner or person in charge ordinarily under any duty to give licensees warning of concealed perils, although he might, by the exercise of reasonable care, have discovered the defect or danger which caused the injury. It follows that, as a general rule, the owner or person in charge of property is not liable for injuries to licensees due to the condition of the property, or, as it has been expressed, due to passive negligence or acts of omission. A fortiori, if licensees choose to make use of property although there is open and obvious danger thereon, the owner cannot be held liable for injury to a licensee because of such danger. It has been said, however, that the owner is under a duty not to expose a licensee to perils which could be avoided by the exercise of reasonable care. The owner has been held not liable for injuries which a mere licensee on his property has received from excavations, a trench, a ditch, a cistern, a hole in the ground, an uncovered coalhole, a

steam pit, a drain used to carry away hot water, a vat of hot water, elevators, unguarded or insufficiently guarded elevator shafts, floor openings, a hole in a bridge, an opening in the platform of a fire escape, uninsulated or insufficiently insulated electric wires, stairways, scantlings or pieces of timber on the floor of a hall of an office building, lack of light in a tenement house hallway, a pile of lumber, a heap of stones, a derrick, a moving crane, log rollways, a defective farm crossing over a railroad, a defect in the roof of a barn, a wire stretched across the outer edge of a lawn to keep off trespassers, a barbed wire fence along the boundary of the premises, the fall of a gravestone in a cemetery, a fire on the premises, an explosion of gas, the breaking of a machinery belt, or failure of a servant of the owner to use reasonable care in throwing a bale of hay from a loft."

45 Corpus Juris, 798-802, sec. 203.

Disregarding, for the moment, the many adjectives used by the libellant in qualifying the alleged acts which resulted in his injury, it is clear that the physical cause of the injury was an open hatch in some part of the vessel. The reason, as stated by the libellant, for his fall into the open hatch was that said open hatch was not illuminated so that the libellant could see said open hatch.

The libellant alleges that the vessel was docked at the time and place, for the purpose of undergoing repairs by the respondent Bethlehem Steel Corporation (Libel, page 3, Eighth Article). He therefore had knowledge of the fact that he could not reasonably expect the vessel to be in the same condition throughout as might be the case if the same had not been withdrawn from navigation.

If, as is contended by the respondent, the libellant was at most a licensee, he must allege facts showing that the

respondent committed some overt act after the libellant boarded the vessel as such licensee and that such overt act proximately caused his injury. There was no affirmative duty on the part of the respondent to perform any act such as lighting the area around the hatch. Respondent's only duty was to refrain from commiting an overt act of negligence after the libellant came aboard. A licensor is entitled, under the law, to remain passive and has no affirmative duty. There is no allegation of any fact in the libel showing that the libellant notified any responsible agent of the respondent that he intended to go to the particular part of the vessel where the open hatch would be encountered. Libellant does not even allege that any agent or employee of respondent was aboard the SS "Frank G. Drum" at the time the libellant went aboard. All he says is that John One was charged with the duty of permitting members of the Coast Guard to board the SS "Frank G Drum" for the purpose of making inspections of said ship and that John Five "was in charge of that certain ship which was then and there known and referred to as SS 'Frank G. Drum' hereinafter mentioned."

Respondent has already shown (15 U.S.C.A., Sec. 45) that there wasn't anything the respondent could have done about keeping the libellant off of the vessel. The mere fact that John Five was in charge of the vessel does not mean that John Five was on the vessel.

Although the libellant alleges that the Tide Water Associated Oil Company was the owner and operator of the SS "Frank G. Drum" at the time of the happening of the accident this is a legal impossibility. Pursuant to Executive Order No. 9054, 7 Fed. Reg. 837, as amended by Executive Order No. 9244, 7 Fed. Reg. 7327, there

was established within the office for Emergency Management of the Executive Office of the President, a War Shipping Administration under the direction of an Administrator appointed by and responsible to the President. The Executive Order provides in part as follows:

"The Administrator shall perform the following functions and duties: a. Control the operation, purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States, except (1) combatant vessels of the Army, Navy, and Coast Guard; fleet auxiliaries of the Navy; and transports owned by the Army and Navy; and (2) vessels engaged in coastwise, intercoastal, and inland transportation under the control of the Director of the Office of Defense Transportation."

Title 50 U.S.C.A., App. Sec. 1295.

III.

With reference to Exceptions No. III, IV, V and VI:

The respondent contends that it is at least entitled to know the capacity in which the respondents John One, John Five and John Six were serving as agents or servants or employees. Unless the libellant is compelled to give some clue to the scope of the employment of these fictitious persons and what their duties were by alleging facts clearly showing the relationship which the libellant claims each one of these fictitious persons bore to the respondent, then it will be impossible for the respondent to prepare an answer in accordance with the requirements of general rule 26 which states that "all answers shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, . . ."

The libellant has stated his contentions with reference to John One, John Five and John Six in such a confused manner as to make it impossible to determine the identity of any one of such fictitious persons. If the libellant would allege that John One was the master of the SS "Frank G. Drum" or some other officer of said vessel or a bos'n or able bodied seaman, respondent would have some information upon which to predicate an answer. The Court will take judicial notice of the fact that it is possible for the libellant to obtain exact information with reference to the name, address and capacity of each person who might have been on board the vessel at the time and place referred to in the libel. Libellant can obtain a copy of the Shipping Articles.

More confusion arises because of the allegations that John One was an agent, servant and employee of John Five and John Six; that John Five was an agent, servant and employee of John One and John Six; and that John Six was an agent, servant and employee of John One and John Five.

IV.

In the Tenth Article the libellant refers to checking upon guards on duty but he doesn't allege that there were any guards of any kind on board the SS "Frank G. Drum" at the time he boarded the vessel. If there were no guards on duty aboard said vessel then obviously the libellant would not be required to go aboard for the purpose of checking on any guards. His allegation that it was also his duty to make further checks on docks to verify the reports of the Coast Guardsmen on duty means nothing unless he alleges that some Coast Guardsman on duty on said vessel made some report which required the presence of the libellant. In the final analysis, it is quite clear from the law governing the Coast Guard (Title 14 U.S.C.A.,

Sec. 45) the only duty of the libellant would be to inspect the vessel for the purpose of finding out whether there had been any violation of any law of the United States.

V.

The allegation in the Eleventh Article that the libellant entered the ship for the purpose of inspecting said ship "for the benefit of the respondents herein" is a conclusion.

If any inspection made by the libellant was for the benefit of this excepting respondent, the facts should be alleged so that the court could draw the conclusion that the inspection was for the benefit of the respondent. If we look at the allegations in the other Articles of the libel we find that libellant claims that he was checking upon guards and verifying the reports of the Coast Guardsmen on duty. These allegations show no benefit to the respondent in the sense that the benefit was one which would create the relationship of invitor and invitee.

If a fireman comes into your house to put out a fire his entry is for the benefit of the owner of the premises and also for the benefit of the neighboring houses but it is not the kind of benefit which is referred to as one of the elements which makes up the relationship of invitor and invitee. Preventing spies and saboteurs from damaging the vessel would, of course, benefit the owner of the vessel, but the obvious purpose of the activities of the libellant was to safeguard the interests of a nation at war. As a matter of law it would be impossible for a member of the armed forces of the United States to be assigned to the duty of protecting private property for the benefit of the owner of such property. The services of the armed forces are never used for the purpose of policing private property for the benefit of the individual owner.

VI.

The allegation in the Twelfth Article with reference to the activity of the respondent in so far as the repair docks are concerned has no place in the libel for the reason that there is lack of any showing of proximate causal connection between anything done or omitted on the repair docks and the act of the libellant in falling into an open hatch.

Admiralty rules of pleading require specific allegations of negligence. The libellant is evidently proceeding on the theory that the rules of pleading adopted by the State of California are applicable in admiralty. There is no question about the fact that negligence cannot be pleaded generally in admiralty. Aside from this observation, the allegation with reference to the contention that the accident was entirely due to the manifest incompetency, fault, negligence, carelessness and unlawfulness of respondents is not even a general allegation of negligence. It is an attempt to plead proximate causal connection but the rules require an allegation of fact showing a proximate causal connection between a specific negligent act and the injury. Therefore, this particular language on lines 29 to 31, page 4 of the libel, is a conclusion and therefore irrelevant and incompetent.

The language "among other particulars," line 1, page 5 of the libel, is irrelevant and incompetent for the reason that it alleges no specific act of negligence. It is also lacking in distinctness. The respondents are entitled to know before the day of trial and the introduction of evidence what the libellant claims as the basis of his suit.

The same defect exists with reference to the allegation in line 1, page 6 of the libel, that "there is negligence in other respects as will be shown upon the trial."

The only fact alleged in subdivision (f) of the Twelfth Article is that the respondents "permitted said hatch to remain open, unguarded and in a dark condition." If an open unguarded hatch, not illuminated, is a trap, then the Court can draw that conclusion itself. The libellant cannot, by a conclusion, establish that an open unguarded and unilluminated hatch is a trap. A trap is something which is set for the purpose of injuring another. There is no allegation in the libel to the effect that the respondent opened the hatch and left it open for the purpose of causing the libellant to fall into it.

Respectfully submitted,

LASHER B. GALLAGHER,

Proctor for Respondent, Tide Water Associated Oil Company, a corporation.